

93

*Scotland, Episcopal Clergy*

THE  
APPEAL  
OF THE  
Episcopal Clergy  
IN  
SCOTLAND  
TO THE  
LORDS in PARLIAMENT.

WHEREIN

The Proceedings of the Presbyterian Judicatures against Episcopal Ministers are prov'd to be contrary to the Laws of the Land, to express Acts of Parliament, to common Equity, and to former Precedents in the like Cases.

In Which

The Sentences of the Lords of Justiciary against them are likewise consider'd, together with His Majesty's Act of Indemnity, and the Reasons in Law, why those Sentences ought to be revers'd. In a Letter from a Gentleman in *Scotland* to the Archbishops and Bishops of *England*.

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**T**HE Judgment of the Lords of Justiciary being so long protracted, and the Sessions of Parliament so far spent before the Petition of Appeal could be got ready, that by the standing Rules of the House of Lords, it could not be heard last Sessions, was the Reason the Appeal was not then lodged, which will, GOD willing, be presented early next Sessions.





*My LORDS,*



THE Episcopal Clergy in *Scotland* having been the chief Mark, at which the Bolts of the profest Enemies of the Church of *England* have been constantly levelled ; I hope, it will not be thought improper at this Juncture, when the Church-Party here are ready to expire under their Persecution, to give your Lordships an Account of the Treatment, they have met with, by Prosecutions lately carry'd on against them, *First*, before Presbyteries and Committees of Synod, in the Country ; and, *Thereafter*, before the Criminal Court at *Edinburgh* ; and of the Sentences pronounced against them in these Courts ; together with their Defences. Which are humbly submitted to your Lordships Consideration, in order to form your Judgment in that Matter, which is now to be brought before your Lordships in Parliament by Appeal.

'Tis a hard Fate; attends those Gentlemen of the Episcopal Church, IF they are not only to be turned out of their Churches and Livings, Hand over Head, by Military Force, but must likewise be deemed Criminal

for asserting and maintaining their just Right in a legal Manner; IF their Appealing, from the meanest and lowest Judicature of the Church to a higher either in Church or State, in a Matter that concerns their Temporal Right and Freehold, be a sufficient Ground for Articles of Impeachment; IF it be a Crime in them, which is a Duty in every other Person, to retain their lawful Right and Possession, until they are legally depriv'd and found to have forfeited the same, for some Crime, for which the Law has ordained such Punishment: They are of all Subjects the most miserable. This would have been a great Discouragement to those Unfortunate Gentlemen: But that they consider the *dernier* Relort is in your Lordships, and that by your Judgment they must stand or fall.

It has always been esteemed the great Happiness of a *British* Subject, that he is not liable, either in his Life, Fortune or Freehold, to any Judicature but such as is established by King and Parliament; nor is he to be tried by any other Laws than by the Laws of the Land.

It was the great Complaint in the Bill of Rights against the late King *James*, That he had taken upon him to cancel our Security from the Laws, by a dispensing Power; and erected Commissions to deprive Subjects of their Properties, not according to Law, but Humour. And certainly, it must be highly Criminal in Presbyteries and Committees of Synod (a Judicature that never had the Honour to be named in our Statute Books) to set themselves up as Tribunals to Depose, Forfeit and Deprive Men of their Properties, if it can be proved to be without the Authority of the Legislature.

That

That your Lordships may have this Matter fully before you, it may not be improper to give you an Account from our Acts of Parliament, how the Law, with Respect to the Church, has stood ever since the Reformation. And tho' it may occasion some Repetition by mentioning the Acts now, and reciting them again, when they are applied to the particular Defences; yet it will be found useful in judging how far they are properly urged, or prove, for either Party in this important Case.

Your Lordships know, the Reformation was begun in *England* by the Bishops and Clergy in the Reign of *Henry VIII.* carry'd on by *Edward VI.* and finish'd by *Queen Elizabeth*, before it took Effect in *Scotland*; where it was afterward carry'd on by the Nobility and Gentry called, *The Lords of the Congregation*, with the Assistance of the Bishops and Prelats, as I shall have Occasion to show hereafter; which meeting with Opposition from *France* and elsewhere, till that glorious Queen sent Assistance from *England*, and at last brought about that great Work, so as the Reformation came to be fully agreed upon in *Scotland*, *Anno 1560*, which was settled by a Law, *Anno 1567*, with the Approbation of the Prelats, Barons and Burgeses in Parliament assembled.

The first Acts, we meet with in our Statute-Books, that regard the Protestant Religion, are in the first Parliament of King *Ja. VI.* *Anno 1567*, where, by the five first Acts of that Parliament, the Papal Authority is shaken off, Mass and Idolatry condemned, and the Articles of the Protestant Faith settled and confirm'd by His Majesty and the Three Estates in Parliament.

By



By the sixth Act of that Parliament, *Those are only declared to be Members of the true Church, who agree, in Doctrine, Worship and Sacraments with the then Ministers of the Evangel, conform to the Confession of Faith,* which by Act 46. Par. 3. Ja. VI. Anno 1572, all Archbishops, Bishops and other Ecclesiastical Persons, are obliged to sign. And if any Person, having any Ecclesiastical Living, did maintain any Doctrine contrary thereto; the Inferior Clergy being convicted thereof before the Archbishops and Bishops, &c. and the Archbishops and Bishops before the General Assembly; the same was declar'd to be a just Cause of Deprivation.

By the seventh Act of the foresaid Parliament 1567, the Examination and Admission of Ministers is committed to the Church: And Patrons are obliged to present qualified Persons to the Superintendent, &c. within six Months, after a Vacancy should come to their Knowledge.

By Act 69. Par. 6. Ja. VI. the King declares and grants Jurisdiction to the true Kirk, which is there said *to consist and stand in the Preaching of the Word, Correction of Manners and Administration of the Sacraments; and declaring that there is no other Face of Religion, nor no other true Kirk than that which by the Favour of GOD was established; and there should be no other Jurisdiction Ecclesiastical acknowledged within this Realm than that which should be within the said Kirk.*

By Cap. 100. Par. 7. of that King, it is further provided, *That every Parish should have a Minister with a reasonable Stipend; and that Churches annexed to Prelacies should be provided with sufficient Ministers and competent Livings; and where any Prelacy should be*

there-



thereafter conferred upon any Person, that it should be with the Reservation of a competent Stipend to the Minister.

As those Privileges, in Favour of the Church, flowed from the King : So His Majesty's Royal Power and Authority over all Estates, as well Spiritual as Temporal, is fully acknowledged; and His Jurisdiction in all Matters Spiritual or Temporal over all Persons of what Degree, Function or Condition soever, is amply ratified, *Ja. VI. Par. 8. Cap. 129.* Which is thereafter confirmed, and His Royal Prerogative again asserted over all Estates, Persons and Causes, *Ja. VI. Par. 18. Cap. 1.* Which Acts are still in Force, unrepealed, and again confirmed by the 4th and 15th Act, *Par. 1. Cha. II.*

Ministers, at that Time, beginning to turn insolent, as *Spotiswood* and *Sir George Mackenzie* observe, and being then dissatisfied with Episcopacy, became very seditious and turbulent, protesting, that nothing might pass in Parliament concerning the Church, till they were heard, and against the proclaiming of the Acts of Convention of Estates, and refusing to be judg'd by them, or by the Privy Council. And about that Time the new Judicature, call'd a Presbytery, began to be set up; the first of which being the Presbytery of *Edinburgh* in May 1581, as *Calderwood* informs us, and which had not the Authority of any Law till the Year 1592. And this occasion'd an Act to be made, which is *Cap. 131.* immediately subsequent to the former, which recites, *That there being sundry Forms of Judgments and Jurisdictions in Spiritual as well as Temporal Causes, by which His Majesty's Subjects were conven'd, and Pains Civil, Pecunial or Ecclesiastical inflicted upon them. For Remedy whereof in Time coming, so that (according to the laudable Act of His deceased Grandfire King James IV. of worthy Memory)*

Memory) all His Highness's Lieges, being under His Obeisance, must be ruled by His own Lawes and the common Lawes of the Realm, and by no other Lawes whatsoever. Therefore Our Sovereign Lord, and Three Estates, discharge all Jurisdictions and Judgments, Spiritual and Temporal, which are not approved by His Highness and His Three Estates. Certifying all those, who should exerce such Jurisdiction (not allowed and approved, as aforesaid) and also the Obeyers thereof, that they should be punish'd as Contemners of His Majesty's Authority. And His Majesty strictly Prohibites and Discharges any of His Subjects, Spiritual or Temporal, to meet, or assemble themselves together in any Meeting, Convention or Assembly, to determine in any Matter, Civil or Ecclesiastical, except in the ordinary Judicatures, under such Pains as are inflicted in Cases of unlawful Convocations. And this Act is often confirmed, and particularly by the fore-said 4th and 11th Acts, Par. 1. Cha. II. and is still in Force.

That Bishops and other Churchmen might exerce such Jurisdiction as was thought necessary for them, and not mistake themselves in those Matters, which the Law had not committed to their Cognizance by going beyond their Bounds, either in relation to the Crime or Punishment, the very next Act, Cap. 132. Par. 8. lays down the particular Causes and Manner of Deprivation of Ministers, and what Crimes are cognoscible by the ordinary Bishop of the Diocess, &c. and what by His Majesty's Criminal Judges. And to the First belongs Heresy, Papistry, false and erroneous Doctrine, Fornication, Drunkenness, Nonresidence, Plurality of Benefices, Simony and Dilapidation. And to the Last, Treason, Slaughter, Mutilation, Adultery, Incest, Theft, common Oppression, Usury, Perjury and Falshood.

*Anno 1587, After the King's perfect Age, His Majesty, with the Advice of the Three Estates, Confirms and Ratifies all the Laws formerly made concerning the Liberty of the true Kirk; which were all made under Episcopacy.*

All these Laws are again recited and confirmed in the following Parliament, *Anno 1592, Cap. 114.* (which is the first legal Establishment of Presbyterian Church Government, only with this Alteration, That whereas formerly Presentations were directed to Bishops, &c. they are, by this Act, appointed to be directed to Presbyteries, who were obliged to receive such qualified Persons as should be presented by the Patrons. And it is therein declared, *That it should be lawful to the Kirk and Ministers thereof, to hold and keep an Assembly once every Year, or oftner, pro re nata; the King or His Commissioner being present, where he might appoint the Place where, and when they should hold their next Assembly, &c.* And their Provincial Synods are orderd to be kept twice every Year, as they were in Use to be. And *the Presbyteries, and Kirk-Sessions, with the hail Jurisdiction and Discipline of the Kirk, are Ratified as they were agreed unto by His Majesty in Conference holden with certain of the Ministers convened for that Effect, of the which Articles the Tenor follows.*

“ Matters to be treated in Provincial Assemblies.

“ Thir Assemblies are constitute for weighty Matters

“ necessary to be intreated by mutual Consent and

“ Assistance of Brethren within the Province, as need

“ requires. This Assembly hath Power to handle,

“ order and redress all Things omitted or done amiss in

“ the particular Assemblies. It has Power to deprive

“ the Office-Bearers of that Province for good and just

B

“ Causes



“ Causes deserving Deprivation. . And generally thir  
 “ Assemblies have the hail Power of the particular  
 “ Elderships whereof they are collected.

“ Matters to be treated in the Presbyteries. The  
 “ Power of the Presbyteries is to give diligent Labour  
 “ in the Bounds committed to their Charge, that the  
 “ Kirks be kept in good Order, to enquire diligently  
 “ of naughty and ungodly Persons, and to travel to  
 “ bring them into the Way again by Admonition, or  
 “ Threatning of GOD’s Judgments, or by Correction.  
 “ It appertains to the Eldership, to take Heed, that  
 “ the Word be purely preach’d, the Sacraments rightly  
 “ administrated, and Discipline observed, &c. Anent  
 “ particular Kirks, if they be lawfully ruled by sufficient  
 “ Ministers and Session, they have Power and Juris-  
 “ diction in their own Congregation in Matters Eccle-  
 “ siastical.

I have the more fully insert those Articles, they being the legal Foundation of the Presbyterian Church-Government in Scotland; and that nothing, that may be thought Material, be omitted, there is a Clause in this Act, in the following Words, *The King’s Majesty declares, That the 129 Act of the Parliament 1584 shall notwize be prejudicial, nor derogate any Thing that GOD has given to the Spiritual Office-Bearers in the Kirk, concerning the Heads of Religion, Matters of Heresy, Excommunication, Collation or Deprivation of Ministers, or any such like essential Censures, specially grounded and having Warrant from the Word of GOD.*

This great Change in the Church-Government, as *Spotiswood* observes, was occasioned by the Presbyterian Party’s taking Advantage of the King’s being engaged against the Earl of *Bothwell*, who was then in Rebellion; and in other Difficulties: They in an Assembly, held



held at that Time, insisted upon Four Articles, where-  
of this was the *First*. The *second* was, That the Act  
of Annexation should be abrogated. *Thirdly*, That  
Abbots and Priors should not sit and vote, as represen-  
ting the Church in Parliament. *Fourthly*, That the  
Land should be purged of Blood. And the same Au-  
thor observes, that the King, becaule of His present  
Difficulties, was under a Necessity to comply with the  
*First*; and agreed to the *Last*, the other Two being laid  
aside. But your Lordships will perceive, that the Or-  
der of Bishops was not taken away by this Act, far less  
declar'd unlawful. And the same Author tells us,  
That several of them possess'd by their Titulars all along.  
'Tis true, their Jurisdiction was impair'd thereby, as  
their Revenues were diminished by the Act of Annexa-  
tion of the Temporality of the Benefices to the Crown,  
tho' they might still sit in the Judicatures. So, *Anno*  
1597, about Five Years thereafter, we have a very  
remarkable Act, it is the 231, of King *James's* 15th  
Parliament, which acknowledgeth the many and great  
Privileges granted by the King's Royal Predecessors in  
Favours of Bishops, and that they had been always One  
of the Three Estates of the Kingdom, and His Majesty  
protesting His great Zeal for the true Religion presently  
profest within the Realm, therefore declares, *That such*  
*Persons, as His Majesty should provide to the Office,*  
*Place and Dignity of Bishop or other Prelacy, should be*  
*actually Ministers in the Church, and who should sit in*  
*Parliament, as other Ecclesiastical Prelats had done be-*  
*fore.* And at that Time of Day, this was thought no-  
wise inconsistent with Presbytery. For it is declared  
in that very Act, *That the same was without Prejudice*  
*to the Jurisdiction and Discipline of the Church by Gene-*  
*ral Assemblies, Provincial Synods and Presbyteries.* And

the General Assembly at *Dundee*, convened upon this Occasion, agreed, That Fifteen should sit in Parliament as representing the Church.

'Tis true indeed, they took upon them to censure and excommunicate Bishops afterwards, for not observing the Cautions, given them by the General Assembly, in their voting in Matters which they judged might lessen the Assembly's Power. But this is still an Argument, that the Church being represented by Bishops in Parliament, was neither unlawful, nor against their Principle at that Time.

And it is apparent by Act 2. Parl. 18. *Ja. VI.* That it was never meant by His Majesty, that the State of Bishops was to be suppressed, their sitting as One of the States of Parliament being declared to be One of the Fundamentals of the Constitution. So that the only Difference, that seems to have been introduced by the Act 1592, establishing Presbytery with respect to Bishops, was, That whereas formerly the Presentations were directed to Bishops or Superintendents, &c. who had Power by themselves to order all Ecclesiastical Matters, they were by this Act to be directed to Presbyteries, who were ordered to receive such Presentations, give Collation, and to take Order in other Ecclesiastical Matters, according to the Power given to them in their respective Judicatures, where Bishops were really Members.

As Episcopacy was not expressly abrogated all this While, as Sir George Mackenzie observes, and that the Bishops continued to sit in Parliament: So they were restored to their Spiritual Jurisdiction by Act 2. Parl. 18. *Ja. VI. Anno 1606*, and more fully by the First Act of His 21 Parl. *Anno 1612*, and Presbytery abolished, which was never restored by any Law till the Revolution,

tion. For I do not reckon those *Rebellious Assemblies*, during the *Usurpation*, held without His Majesty's Authority, who sat and past Acts without the Royal Assent, and which stand condemned, and ordered to be deleted out of our *Statute-Books*, by subsequent *Parliaments*.

I ask Pardon for this Digression, and return to the Year 1593, where soon after *Presbytery* was first settled, there was an Act made, directing how the *Decrees* of the Church should be prosecuted. It is Act 104. Parl. 13. Ja. VI. wherein, after reciting the Act, settling the Church Government by General Assemblies, Synods and Presbyteries, *And that His Majesty was willing and desirous that their Sentences and Decrees in Matters pertaining to their Jurisdiction should be put in Execution; and that notwithstanding thereof a Number of obstinate People contemned the Sentences and Decrees of the said Assembly, &c.* And His Majesty considering, that the said *Kirk* has no other Punishment in her Hands, but *Spiritual*: Therefore He Ordains, That where any Person refused to obey the Sentences of the said Assembly or other Church Judicatures, they are to direct their Bedle to charge the Person to obey their Sentence in Name of GOD and the King, which if they fail, the Minister of the Parish is to charge him Three several Days from the Pulpit, to obey the said Ordinance and Decree in the like Manner, which if they likewise fail, then shall the said Assembly or Judicature, who made the said Decree, mean the Matter by their Supplication, to the Lords of Session, containing the Substance of the Process, the Sentence and Decree pronounced against the said Person, with a Complaint of their Contempt and Disobedience. Whereupon the Party complained on being first cited and heard to propone their lawful Defences, in Case they  
compear.



*compear: And if they compear not, the said Lords of Session or Secret Council shall, propter Contumaciam, give out Letters to put the said Person to the Horn, incase of Disobedience and continuing in their Contempt and Rebellion.*

I am now come as far as the Revolution, where in the Parl. 1690, Act 5. the Presbyterian Government is again settled, and the Act 114. Parl. 1592 reviv'd, and the Power of Presbyteries, Synods, and General Assemblies confirm'd: And the Government of the Church in the mean Time is put into the Hands of such Presbyterian Ministers, as had been outed since the First of January 1661, for not complying after the Restoration, who, I believe, might be about 49 in Number.

In this Act, there is a Clause bearing, *That to the Effect the Disorders, which have happened in the Church, may be redressed, His Majesty, with Consent of Parliament, grants Power in the mean Time, until the Church should take further Course therewith, to the first Meeting of the said Presbyterian Ministers, which was ordained to be upon the Third Tuesday of October thereafter, And those who should be authoriz'd Visitors by them, to try and purge out all insufficient, negligent, scandalous and erroneous Ministers, by due Course of Ecclesiastical Process. And it is thereby declared, that whatsoever Minister, being conven'd before the said general Meeting or the Visitors appointed by them, and should either prove contumacious in not appearing, or be found guilty, and be therefore censur'd with Suspension or Deposition, that they should ipso facto, be suspended from, or deprived of their Stipends and Benefices.*

Your Lordships will observe, That this is the first Act, that makes Sentences of Deposition of Ministers, *ipso facto*, infer Deprivation of their Stipends and Benefices: And



And that this Sanction was only given to the Sentences of the first general Meeting appointed by Parliament, and to thole Vilitators appointed by them; and that there is long ago an End to that Visitation.

There is likewise another Clause in this Act, whereby Episcopal Ministers, who had been thrust out of their Churches by the Presbyterians, preceeding the 13th Day of *April* 1689, were to have no longer Right to thole Churches, but that the Presbyterian Ministers who possess'd themselves thereof, should have Right to those Benefices and Stipends, according to their Entry in the Year 1689.

This puts me in Mind of another Act, that I had almost forgot, which is made use of by the Respondents; and it is the very next Act after Presbytery was settled in 1592. For in these great Revolutions of the Church, Things are permitted, and sometimes authorized, as necessary upon those Occasions, which at other Times, by the strict Rules of Law or Equity, might not be so expedient.

To make Way for the Creatures of the then new establish'd Church Government, the 115 Act, which is the very next Act after Presbytery was settled, recites the great *Abuses, which are lately crept into the Kirk thro' the Misbehaviour of such Persons, as were provided to Ecclesiastical Benefices, and thereafter neglecting their Charge by leaving their Cure; or committing such Faults or Enormities that they are found worthy of the Sentence of Deprivation, &c. Which Sentence is the less regarded by them, because albeit they be deprived of their Function and Cure within the Kirk; yet they think they may brook lawfully the Profits and Rents of the said Benefices, during their Lifetime, notwithstanding the said Sentence of Deprivation.* Therefore Power is given to Presbyteries (who

(who had Occasion to meet often) as well as to General Assemblies and Synods, contrary to their express Power limited in the former Act, to pronounce Sentences of Deprivation against such Prelates and Vicars as had deserted their Posts, or otherways criminal, *who had been admitted to their Benefices since His Majesty's Coronation.* But no mention is made of those who should happen thereafter to be admitted; and even such as had Votes in Parliament, Council or Session, tho' admitted since, are excepted. And the Sentences of such Presbyteries and Synods, &c. against such as had been admitted as aforesaid, were ordained to be *a sufficient Cause, in all Judgements, to seclude Persons, so provided and deprived, from all the Profits and Emoluments of the Cure, Parsonage or Vicarage.* And this tho' a short prov'd a fruitful Harvest to young Expectants. For the Act had a Retrospect, and went back to confirm Sentences of Presbyteries, even before Presbyterian Government was settled. Your Lordships will see the Use that is made of this Act afterwards.

The next Act, That relates to the Church, after the Revolution, is Act 22. Parl. 1693, Intituled, *Act for settling the Peace and Quiet of the Church*, whereby it is Enacted, *That no Person be admitted or continued for hereafter to be a Minister or Preacher within this Church; unless 1<sup>mo</sup>, He have taken the Oath of Allegiance and Assurance, in Manner appointed by the Sixth Act of that Parliament. 2<sup>do</sup>, That they subscribe the Westminster Confession of Faith, Ratified in the Parliament 1690, and acknowledge the Doctrine therein contain'd, and promise to adhere thereto. 3<sup>th</sup>, That they own and acknowledge the Presbyterian Church-Government to be the only Government of the Church; and that they will submit themselves thereto, and concur therewith,*  
and

and never endeavour the Alteration thereof. 4<sup>to</sup>, That they subscribe to observe, and actually observe, the Uniformity of Worship, and of the Administration of all publick Ordinances. 5<sup>to</sup>, That they should betwixt and a certain Day, every Man by himself, apply to the General Assembly, or other Church-Judicatures, and qualify themselves as aforesaid, under the Pain of being deposed by the said Assembly, &c. *tam ob Officio quam a Beneficio*. And those who applied, and qualified themselves as aforesaid, were to have and enjoy His Majesty's Protection, ay and while they were received into the Government of the Church, Providing always, That the Benefit of this Act should not be extended to such as were scandalous, erroneous, negligent or insufficient, and against whom the samen should be verified within the Space of 30 Days after the said Application: But those, and all other in like Manner guilty, are declared to be liable and subject to the Power and Censure of the Church, as accords. And there is another Clause in this Act, Ordering the Lords of Privy Council, and all other Magistrates and Judges, *to give all due Assistance for making the Sentences and Censures of the Church and Judicatures thereof to be obeyed, or otherwise effectual, as accords.*

Anno 1695, Cap. 22. there is an Act made against Ministers intruding themselves into vacant Churches, by which any Person, so intruding without an orderly Call and Admission, was declared incapable of enjoying any Church for the Space of 7 Years. And the Execution of this Act is committed to Sheriffs, Stewarts, Magistrates of Burgh, &c. And it is recommended to the Privy Council, *to remove all those, who had already intruded since the Establishment of the Church-Government; and to binder Ministers deposed from preashing or*



*exercising any other Acts of the Ministerial Function; which, says the Act, they cannot do, after they are deposed, without a high Contempt of the Church and the Laws establishing the same.*

Episcopal Ministers having feel'd the heavy Effect of thole Acts, subjecting them to Presbyterian Judicatures, by a continued Course of Prosecutions and Sentences of Deprivation, upon Pretence of Scandal, erroneous Doctrine, Negligence or Insufficiency; in so much that they generally omitted to qualify themselves to the Civil Government, as being sensible they could have no Benefit thereby, so long as they were subject to the Presbyterian Judicatures. Therefore the Parliament 1695, Cap. 27. posterior to all the former Acts, Enacted and Declared, That all the Episcopal Ministers, *who had continued in their Churches since His Majesty's Accession to the Crown, and who should take the Oaths of Allegiance and Assurance, and behave themselves worthily in Doctrine, Life and Conversation, as became Ministers of the Gospel, should enjoy His Majesty's Protection as to their Churches and Benefices, any Thing in the Act of Parliament 1693, Intituled, Act for Settling the Quiet and Peace of the Church, notwithstanding.*

After this, most of the Episcopal Ministers in Scotland, who had escaped the Fury of the Mob, that drove them from their Churches in 1689, and the Prosecutions of the Presbyterian Judicatures since, took the Oaths. And except when Encroachments were now and then made upon them by the Presbyterian Judicatures, they have enjoyed their Livings peaceably and quietly, till of late Endeavours have been used to extirpate every Man of them, as will appear anone. But to proceed with the Laws.



As the Law statutes particular Punishments for all Offences, Scandals and Immoralities, which the Civil Magistrates are bound to execute: So by Act 31. Par. 1696, which was the first Parliament after Episcopal Ministers were freed from subjecting themselves to the Presbyterian Judicatures, all Judges and Magistrates are more strictly order'd to enquire after Scandal and Immorality; and where they did not reside themselves, to appoint such Deputies as should be recommended by the Kirk-Sessions, for putting the Laws in Execution. And it is therein declared, *That no Pretence of Difference of Persuasion in Matters of Religion should exempt the Delinquent from being censur'd and punish'd for such Scandal and Immorality.*

In all succeeding Parliaments in Scotland, where the Acts in Favours of the Presbyterian Government were ratified; and particularly Anno 1700, 1702, 1703, &c. it is, with an express Reservation of the Liberty granted to the Episcopal Ministers by the Act 1695. And so that Act continued as an Exception, *in græmio*, of all the Church-Acts till the late happy Union.

I need not put your Lordships in Mind, what Judgements you have pass'd, and what Acts have been made since, for preserving those of the Episcopal Communion, as well as their Ministers from undue Prosecutions. Mr. Greensheel's Case, and the Act, *Anno Decimo Regine*, Intituled, *Act against disturbing those of the Episcopal Communion in that Part of Great-Britain, called Scotland, &c.* will no doubt occur to your Lordships. By which, all Ministers, having Ordination from a Protestant Bishop, are Ordered to be protected in the Exercise of their Ministry, in Baptising, Marrying, and other Parts of their Ecclesiastical Function. In which Act, to show how little any Person (who is not of the

Presbyterian Communion, is subject to their Judicatures) there is a Clause in the following Words, *Declaring, That no Civil Pain, Forfeiture, or Disability whatsoever, shall be any wise incurred by Reason of any Excommunication, or Prosecution in order to Excommunication by the Church Judicatories in Scotland: And all Magistrates are expressly Prohibited and Discharged to force any Person to appear when summoned, or to give Obedience to any such Sentence when pronounced, any Law or Custom to the contrary notwithstanding.*

Having thus laid before your Lordships those several Laws relating to the Church, I shall proceed to give an Account of the Case of those Unfortunate Gentlemen, who have been turn'd out of their Livings, and prosecuted criminally for ascertaining their Rights in a legal Manner.

The Proceedings of the Presbyteries and other Church Judicatures being fully set forth in a Memorial or Case presented to the Provincial Synod of *Aberdeen*, and afterwards laid before the Lords of Justiciary by One of those Clergymen, who had the Misfortune to fall under the Presbytery's Censure; and who was, among the rest, indicted before the Criminal Court, tho' by Reason of Certificates from Physicians of his great Age and Infirmary, by which he was not able to travel, his Sentence was superseded for a Time. However his Case in general is the same with Others: And all the Difference among them is, that some of them were depos'd by Presbyteries, and Others only by Committees of Synod: Some were depos'd for praying for the Pretender in express Terms; and Others, ambiguously, so as, they say, the Pretender might have been meant: Some, for reading the Pretender's Proclamations; and others, for allowing them to be read in their Churches. But their  
general

general Defences, against the Proceedings as being carry'd on in their Absence, against the Relevancy of the Libel, the Competency of the Judicature, the Probation of the Crimes, the Execution of the Sentences, and that the Appellants were all indemnified by His Majesty's most Gracious Act of General and Free Pardon, being the same, I have hereunto annexed the Case, which will inform your Lordships of all that's Material, until the Process was carried on by a Criminal Indictment before the Lords of Justiciary. And shall proceed to give an Account of their Lordships Sentence, with the Appellant's Defences, which are the Grounds upon which they have made their Appeal, and which they humbly submit to your Lordships Consideration.

After the Synod had refused to give any Redress in the aforesaid Case, the Appellants raised a Summons of Reduction of the whole Sentences pronounced respectively against them, before the Lords of Session; as also a Declarator, or *scire facias*, of their Right to their Churches and Benefices, notwithstanding of the pretended Sentences against them; and caused execute the same by summoning the Members of the respective Presbyteries, Synods, &c.

But to prevent the Effect of this Suit, there was in the mean Time a criminal Libel (for so we call Indictments) raised at the Instance of those Presbyterian Ministers, who were put in by the Presbyteries in the Appellants Churches, and the Moderators of the Presbyteries for their Interest, with the Concurrence of the King's Attorney-General against the Appellants.

The Libel, which is always in the King's Name, is to this Effect, That notwithstanding that the Appellants had enjoy'd the Benefit of the Clemency and Protection of the Government, in the Possession of their Church-



es, by Virtue of the Laws therein recited, they, by the foulest Ingratitude and Impiety, did incur the just Censure of the Church; some of them, instead of praying in exprels Terms for Us as the Law directs, having prayed in Equivocal disingenuous Terms, applicable to that Popish Pretender who hath taken upon him the Stile and Title of King of Our Dominions; and Others, under the Name and Title of King of these Realms; and having upon one or other of the Days of *November 1715*, observed a publick Fast, or Day of Prayer, appointed for imploring Success on the said Pretender's Arms; and also having, upon the Second Day of *February 1716*, observed a publick Thanksgiving for the said Pretender's safe Arrival in *Scotland*; and read, or suffer'd to be read, in their Churches a Proclamation, the *Sabbath* immediately preceeding, issued out by the Authority of the Pretender, appointing that Thanksgiving to be observ'd. For the which scandalous and impious Practices they were depos'd from the Office and Exercise of the Ministry in all the Parts thereof, by a Sentence of the Committee of Synod, or by the Presbytery of *Aberdeen, &c.* And notwithstanding of their being so depos'd from the Exercise of the Ministry, for their scandalous Practices above recited, they had taken upon them to invade the Possession of the Ministers, who were settled in their Places, or sent by the Presbyteries to supply the Vacancy, and to exerce the Ministerial Function in the several Churches, or in their Houses, within the Parishes particularly libell'd, in Contempt of the Authority of the Church, and of the Laws and Acts of Parliament establishing the same. And therefore they ought to be Decern'd, not only to cede the Possession of their Manes and Glebes, &c. But each of them in the Sum of 100 *lib. Sterling* of Damages,

images, and otherwise punish'd with the Pains of Law, as Disturbers of the Peace, and Encouragers of Sediti-  
on.

Notwithstanding of the Defences offered for the Appellants, the Lords of Justiciary pronounced a Judgment. By which the Appellants are ordered to cede the Possession of their Churches and Livings, and deliver up the Utenfils belonging thereto, to the Respondents before the 8th Day of *February* 1717-18, under the Penalty of Ten Pound *Sterling*, and prohibiting the Appellants from exercising any Part of the Ministerial Function in their respective Parishes at any Time thereafter : And ordaining them in like Manner to cede Possession of their Manfes and Glebes betwixt and the 8th Day of *April*, under the Penalty of 500 Merks : And moreover to pay a Fine of 25 Pound *Sterling*, and to ly in Prison till the same was paid, and Bail found for the Performance of the other Parts of the Sentence.

The Appellants, thinking themselves aggriev'd by this Judgment, make their Appeal to the Lords in Parliament, and humbly complain thereof for those Reasons, which may be reduc'd into the following Heads.

- I. The Appellants Objection against the Respondents Showing, *i. e.* against the Sufficiency of the Writs produced for founding a Criminal Prosecution.
- II. Against the Respondents Title or Capacity to prosecute such a Suit, they being, *ipso facto*, deprived by Act of Parliament.
- III. Against the Competency of the Presbyterian Judicatures to judge over the Appellants, or to cognosce in such Matters as they were charged with.

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- IV. Because of the Iniquity and Nullity of the Presbyterian Sentences, even suppose they had been the proper Judges in such Cases.
- V. Against the Sentence of the Lords of Justiciary enforcing the same, and refusing to acquit the Appellants from this Criminal Process, upon His Majesty's most Gracious Indemnity.

These being the Grounds for reversing the foresaid Judgment, and which, they humbly conceive, and are advis'd, the Lords of Justiciary ought to have sustain'd, and thereupon acquit the Appellants from the Criminal Prosecution, I shall proceed upon them in Order.

Reason I. founded upon the Insufficiency of the Respondents Showing or Production.

The Appellants, with all Submission, say, That, by the Laws of the Land, and the universal Custom of all the Courts of *Great Britain*, the Witnesses and other Proofs in all Criminal Prosecutions, ought to be examin'd before the Judges, and in Presence of both the Party and Assize. Yet nevertheless the said Lords of Justiciary have sustained Process against the Appellants, upon Proofs of Crimes led and deduced before Presbyteries and Committees of Synod, where neither Party nor Assize were present to hear the Witnesses examin'd, to offer proper Interrogatories to them, or to make Objections against their Evidence. And this Defence is not only founded upon Reason and Practice, but upon an express Act of Parliament, *Ja. VI. Parl. 11. Cap. 91.* which is in these Words, *Statutes and Ordains, &c. That the whole Accusation, Reasoning, Writs, Witnesses and other Probation, and Instructions* whatso-



*whatsoever of the Crime, shall be alledged, reasoned and deduced to the Assize, in Presence of the Party accused, in Face of Judgment, and no otherwise. And that all Persons, accused of Treason or whatsoever other Crime, shall have their Advocates and Procurators to make their lawful Defences.*

The Reason of this Law is, because of the Impression that Witnesses may be under by Force, Fear, Threatnings, Malice or Reward, of which they must solemnly purge themselves before they can be examined; and that their Behaviour, Firmness and Countenance before the Party and Assize, and their being able to give distinct and satisfying Answers to cross Questions, adds more or less Weight to their Evidence. Therefore none are to be condemned upon Depositions emitted; unless where the Party and Inquest are present to be satisfied in those Matters. Far less does it allow Men to be condemn'd upon Extracts or Copies of Sentences, pronounced by Presbyteries or Committees of Synod only sign'd by their Clerk, who has not so much as the Qualifications of a common Notary: And suppose he had, he could not, by his Subscription, bind a Man in above 100 *lib. Scots*; for this were to make Mens Lives and Fortunes depend upon a very precarious Chance. And therefore, as all Depositions ought to be taken before the Judges; so all Writs, made use of in any Criminal Process, ought to be prov'd to be genuine or authentick, before the same be open'd in Evidence: And, if it were otherwise, innumerable Inconveniencies might follow. For tho' in Civil Matters, Extracts, from the proper Officers even of Inferior Courts, are admitted; because there is a Remedy, in Case those Extracts be found wrong, or contrary to the Warrants: Yet, in Criminal Cases, where a Man's Life and Fortune may

be at Stake, they ought never to be allowed; for the Consequence of an Error or Mistake in such Cases may be irreparable.

The Law of *Scotland* allows no Man's Property, far less what may concern his Life and Liberty, to depend upon the Assertion of any one Man of what Authority soever. And therefore Confession of Crimes, which is the strongest of all Proof, tho' the same be emitted before the Judge, and sign'd by him, will make no Proof; unless such Confession be made in open Court, and sign'd by the Party before Witnesses. And in the Case of *Mitchel*, who had confessed, before the Privy Council, his having shot at the Archbishop of *St. Andrews*; but, upon his Trial before the Lords of Justiciary, retracted the same: It was adjudg'd, That his former Confession was not sufficient. And therefore he was put upon the Torture; which had been needless, and even barbarous, if his former Confession had been valid. And the Law is so shy of breaking in upon the Rule laid down by the aforesaid Act, that in the Year 1685, when the Parliament, *Cap. 10.* dispensed with Confessions being made before the Assize, provided they were emitted before the Lords of Justiciary, and sign'd by the Party or the Judges in open Court: Yet that was only in Cases of Treason against the King and Government, and to continue no longer than to the next Session of Parliament. By which it is evident, how little Regard there is had to the strongest Proof, if it be not in Presence of the Assize and in Face of Judgment.

Sir *George Mackenzie* in his *Criminal Treatise*, *Tit. Assize*, observes, that tho' the Privilege, of having the Witnesses examin'd in Presence of the Pannel and Assize, may be past from by the Pannel, because it is introduc'd in his own Favour; yet the Lords of Justiciary, upon  
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the 9th of *March* 1671, in the Case of *Charles Robert-son*, refused to proceed upon Depositions taken, when the Pannel was not present, tho' he requested the same, until he gave his Consent thereto under his Hand. Much more ought they to have been rejected in this Case, where the Defect and Nullity of the whole Proceedings were objected to, and never acquiesced in.

The Respondents cannot be ignorant, that Probation before Presbyteries, and even Judicial Confessions before the highest Judicature of the Church, are never admitted as Evidence in a Criminal Process; as has been often determined. And in the Case of *Alexander Hay* of *Dalgely*, the last of *July* 1598, it was adjudged, That a Probation of Adultery before the Commissaries of *Edinburgh* (who are a Supreme Judicature) was not sufficient in a Criminal Process for Adultery at the King's Advocate's Instance against him. And it was lately found by the same Judges, in the Case of the *Lady Dun* against *Sir Robert Dunbar*, *Novem. 22. 1714*, That the producing of a Decree of an inferior Court was not sufficient to found a Criminal Prosecution for Oppression, unless the Grounds and Warrants thereof were likewise produc'd.

The former Author also makes Mention of an Act of *Sederunt*, or standing Rule of Court, by which no Sentence of any inferior Judicature is to be sustained in any Case above the Value of 100 *lib. Scots*, unless otherwise proved than by the Subscription of the Clerk. And your Lordships know very well, that in Prosecutions, by the House of Commons, for High Crimes, and Misdemeanours, before the Lords in Parliament, the Party's confessing himself to be the Author of any Book, or Writing, &c. by which such Crimes are interr'd, is not prov'd by producing the Records and Journals of



the House of Commons ; but by the Oath of the Clerk, &c. who heard such Confession.

*Object.* 1. But say the Respondents, That Defect of not examining the Witnesses, or producing the principal Depositions, was not objected to by the Appellants, when the Matter was tried before the Lords of Justiciary : Therefore cannot be considered by the Lords in Parliament. For nothing can be brought in by Appeal, but what was before the Judges below.

*Ans.* 1. The want of the principal Depositions and other Evidences, whether by Word or Writing, was such an essential Defect, that the Court ought to have of themselves refus'd all Proceedings without them. And it was *pars Judicis* to see, upon what Foundation the Indictment was built. For, if that was wrong, the Superstructure could not stand ; it being a Principle as certain as any in Geometry, *That the unsuppliable Defect of any necessary Antecedent must needs cause a Nullity of all those Consequences, which depend upon it.*

*Ans.* 2. Tho' the Appellants were scarce heard to object any Thing against the Justice or Legality of the Presbyteries Proceedings ; yet this Defect was urged among others : And particularly, that the Presbyteries Sentence and Proceedings were not put in the Clerk of Justiciary's Hands, that the Appellants might see the same, immediately after they were summoned. And the Case of the Lady Dun, against Sir Robert Dunbar, was strongly urg'd to show the Necessity thereof. And the Respondents, in their printed Case, do acknowledge, that the principal Reason, why the Lords did not admit Process in that Criminal Action founded upon a Decreet of a Baron-Court, was, because the Grounds and Warrants of the Decreet were not produced, and  
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put in the Clerk's Hands, sometime before the Day of Compearance. And was not that the very Reason, why the Lords should not have sustain'd Process in the Appellants Case? Because the Warrants of the Presbyteries Sentences were never put into the Clerk's Hands, or shown to this Day.

*Object.* 2. But say the Respondents, There was no Necessity to produce any Thing, but the Extracts of the Presbyteries Sentences. For those prove sufficiently, that the Appellants were depos'd for the Crimes mentioned therein. And the Question is not, Whether they were justly depos'd, or not? Or, Whether the Crimes were prov'd, or not? For the Lords of Justiciary cannot enter into that Matter: But the Presbyteries Sentence is *Probatio probata*.

*Ans.* 1. The Criminal Libel against the Appellants sets forth, That they had been depos'd by Presbyteries, &c. for praying for the Pretender, keeping Fasts and Thanksgivings, and not praying for King George in exprefs Terms, &c. And that notwithstanding thereof, they had continued to preach, &c. in their Churches; and thereby had been guilty of the Crimes libelled. Now, to make the Appellants Criminal within those Articles, the several Branches thereof ought to have been prov'd, as they were laid down.

If it was not made appear, *First*, That they had been guilty of those Crimes: And *Secondly*, That they were deposed therefore. It was not relevant, *i. e.* their keeping Possession, and preaching in their Churches, was not sufficient to infer a Crime. And what Proof, what Evidence was there brought for proving those Propositions, those Facts, which must make the Libel Criminal, or it could not be so at all? Were the Depositions laid before the Court? Or the Witnesses examined

amined in Face of Judgment? No: But the Presbytery-Clerk has given it under his Hand, that it was so. I beg your Lordships will consider this Matter, which is prosecuted with so much Zeal and Vehemency; and how the Lords of Justiciary have over-ruled this *Demurrer*, and admitted the Presbyteries Sentences as a sufficient Proof, without having the Depositions of the Witnesses, or so much as Copies sign'd by the Judge before them or the Jury.

'Tis true, the Jury are properly Judges of the Probation. But the Probation oft-times requiring in it something of Relevancy to be previously determin'd, the Lords are always Judges, what Manner of Probation is requisite, and may find the Libel relevant to be prov'd after this or that Manner, as they have done in this Process. And in the Case of Falshood, the Trial of which is, by Act of Parliament, committed to the Lords of Session; the Lords of Justiciary find it relevant to be proved by the Decree of the Lords of Session, that the Party is guilty of Falshood: For the Lords of Session's Decree, in that Case, is *Probatio probata*. And this is a further Argument, that except in the Case of Falshood, which, by express Law, is ordered to be tried by the Lords of Session, Probation led before any other Judicature, ought in no other Case to be admitted to put a Man upon the Verdict of an Assize.

2. That Sentences of Church-Judicatures are not to be admitted as *Probatio probata*, is evident from Act 164. Parl. 13. *Ja.* VI. which was made in the full Height of Presbytery: But the Grounds, upon which they proceeded, are to be consider'd by the Lords of Session. For in that Act, plain and full Direction is given, how the Sentences of the Kirk Judicatures are



to be examined and executed. Which is not by the modern Way of Dragooning, Military Force, or by Indictments before Criminal Courts. No; but in the Manner therein laid down. For the Act declares, *That His Majesty considering, that the Church has no other Punishment in her Hand, but spiritual; and that obstinate People contemn the Sentences and Decrees of the Assemblies, and other Church-Judicatures. Therefore His Majesty Ordains, That the said Assemblies, or other Judicatures do direct their Bedle to charge the Person to obey their Sentences in the Name of GOD and the King. Which if they fail, the Minister of the Parish is ordered to charge him Three several Days from the Pulpit, to obey, in the same Manner. Which if they likewise fail, then that Assembly or Judicature, who made the said Decree, shall mean the Matter by Supplication to the Lords of Session, containing the Substance of the Process, the Sentence and Decree pronounced against the said Person, with a Complaint of their Contempt and Disobedience. Whereupon the Party complained on, being first heard to propone his lawful Defences (which no doubt the said Lords were to judge of:) And in case the Party compeared not, then they were ordered to give out Letters to put him to the Horn, propter contumaciam. So that it is manifest from this Act, 1<sup>mo</sup>, That the Church has no Jurisdiction in her Hand, but what is Spiritual. 2<sup>do</sup>, That the Sentences and Decrees of Church Judicatures are only to be put in Execution, in such Matters as pertain to their Jurisdiction, and in the Manner therein appointed. 3<sup>tio</sup>, That before such Sentences or Decrees can have any temporal Effect, they must be subjected to the Review of the Lords of Session, who must call and hear*

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Parties upon their Defences. So that as it would be to no Purpose for the Lords to hear such Defences, if they could not judge of them: It is strange, the Pursuers should now pretend to put their Sentences upon so high a Foot, as to deny the Lords of Session or Justiciary the Power of Reviewing them; and yet at the same Time expect, that they should implicitly ratify them, without considering, whether they were either *licita* or *honesti*.

The Respondents may remember, what Regard was had to the Sentences of the Presbyterian Judicatures, when they took upon them to judge of the Validity of an Episcopal Minister's Orders, whether he was a lawful Minister or not; and whether the Innovations, they alledged he had made in the establish'd Worship of the Church, was a proper Subject for their Cognizance. For tho' they pronounced their Sentence in that Matter, which they esteem'd to be merely Ecclesiastical; and prohibited him to exercise any Part of the Ministerial Function within their Bounds, and had the Concurrence of the Magistrates of *Edinburgh*, and the Approbation of the Lords of Session to make their Sentence effectual; yet such Proceedings against Persons of a different Communion were found unwarrantable; and those Sentences and Decrees revers'd as void in Law, even before the Act of Toleration was made. Much more are such Sentences of Presbyterian Judicatures to be review'd and well consider'd by the Judges, before they interposed the Civil Sanction thereto. And this Case stands recorded in your Lordships Journals *Anno 1710*, where Mr. *Greensheels* was Appellant.

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The Second Reason of Appeal is, That no Process should have been sustained at the Instance of the Pursuers, who pretend to have been admitted by the Presbyteries to the respective Churches said to have been vacant by their Sentences. For that,

Suppose the same had been vacant by a legal Sentence of a competent Judicature; yet those Respondents have no Title to insist against the Appellants for removing them from those Churches and Houses. Because the Respondents pretended Right was not only; *ipso facto*, void; but all or many of the Members of the Presbyteries, &c. who were their Judges, were likewise, *ipso facto*, deprived of their Offices, for not taking the Oaths at their Admission to their respective Churches, or since; as the Act, *Anno Decimo Reginae*, Intituled, *Act for preventing the disturbing those of the Episcopal Communion*, &c. appoints. And this being such a Nullity, as, both by the Law of England and Scotland, disables them, requires no Declarator or *sci-re facias*: But being propon'd by the Appellants, and in the printed Case, the same ought to have been admitted to their Probation; which is still ready to be prov'd by Certificates from the proper Officers, and is sufficient to bar them, *quocunque tempore*. For 'tis a Rule in Law, that *Frustra Legem implorat, qui contra Legem peccat*.

This being a Matter of Fact, upon which the Appellants will hazard all they have in the World, it argued great Confidence in the Respondents, to convene the Appellants, who had taken the Oaths, and to accuse, judge and forfeit them of their Livings, for not

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praying for His Majesty, some few Days, in exprefs Terms; and which, if it had been true, was but a Fine of 20*lib.* and could only have been prosecuted before the Lords of Justiciary within Two Months thereafter. Whereas the Respondents presuming to sit, vote and judge in Presbyteries, or to exercise any Part of their Ministry, and even their pretending now to claim those Churches, to which they have no Manner of Right, is no less than a Fine of 500*lib.* besides a total Incapacity, &c. as aforesaid.

The Third Reason of Appeal is, because the Lords of Justiciary proceeded upon Sentences of most incompetent Judicatures. For neither Committees of Synod, Presbyteries, nor any other of the Presbyterian Judicatures, were either Judges over the Appellants, or in those Matters laid to their Charge.

*Y<sup>mo</sup>.* As to the Sentences pronounced by Committees of Synod. The same were not only pronounc'd; several Months after the Synod was up, and executed by Military Force, without being ever ratified by the Synod, or the Appellants call'd before them, either before or since such Sentence. But all Sentences of that pretended Judicature are void and null, the same not being authoriz'd by Law, or once nam'd in our Statute-Books. And therefore ought not to have been regarded, but adjudg'd void in themselves; and the Pronouncers thereof censur'd as Usurpers of His Majesty's Authority, contrary to Act 131, Parl. 8. *Ja.* VI. and Act 4. Parl. 1. *Cha.* II. made in that Behalf.

*Object.* But say the Respondents, All Judicatures have an intrinick Power to appoint Committees of their

their own Number; and such had been the Practice of the present Judicatures of the Church: And that those Committees were in Effect the Synod themselves, they consisting of as great a Number, as would have made a *Quorum* of the Synod.

*Ans.* Those Practices of the Church, if any such be are illegal and unwarrantable, and can never alter the Laws of the Land, or subject the Appellants in their Fortunes and Freehold to the Sentence of such a Judicature. For tho' Judicatures may appoint Committees for preparing and facilitating Matters brought before them, Was it ever pretended, that their Committees can absolutely judge of Matters that are not some Way or other brought before the Judicature itself, and remitted to them? Do the Committees of either Houses of Parliament, who certainly have a greater Power than the Committees of any other Judicature whatsoever, determine in any Matter that is not first brought before the House? Or, Are their Determinations final, until they have the Approbation of the House? And those Committees often consist of the whole Members, and no other Alteration, but the Ceremony of the Speaker's leaving the Chair. Or, Do they ever sit to do Business, but during the Sessions? Yet the Sentences of the Committee of Synod are pronounced against the Appellants in *July*, Three Months after the Time of sitting of the Synod; which by Act of Parliament is appointed to be in *April* and *October*, without ever calling them to answer before them.

By the same Argument it might be pretended, that the House of Commons may appoint Committees, during the Vacation, to vote Resolutions, grant Supplies, and pass Money-Bills: Or, That the House of Peers may Name Committees for determining Appeals,

after the Parliament is up: Or, That the Judges in *Westminster-Hall* may depute some of their Number to pronounce Judgments or Decrees out of Term-Time.

2. *As to the Sentences pronounced by the Presbyteries*, they are void and null in the same Manner. For, by Act 114. Parl. 12. *Ja. VI.* upon which the Presbyterian Government is founded; and wherein the Power of the respective Judicatures of the Church is particularly set down, it appears, that no Church Judicature under a Provincial Synod, has Power of Deprivation, and that only *for good and just Causes deserving Deprivation*; which Causes the Law particularly expresses, *Ja. VI. Parl. 8. Cap. 132.* And the Crimes, laid to the Appellant's Charge, are none of them. And the Usurpation, Presbyteries have lately made upon His Majesty's Subjects, contrary to Law, can never justify their Proceedings.

*Object.* But say the Respondents, by Act 115. Parl. 12. *Ja. VI.* it appears that Presbyteries have Power of Deprivation. For that Act provides, That whatsoever Sentence or Sentences of Deprivation, either pronounced already, or that should happen to be pronounced thereafter, by any Presbytery, Synod or General Assembly against any Parson or Vicar within their Jurisdiction, provided since His Majesty's Coronation, should be reputed, in all Judgments, a just Cause to seclude them from the Rents and Profits of their Cure, Parsonage or Vicarage. So this Act implies a Power in Presbyteries to pronounce such Sentences.

*Ans.* As the aforesaid Act is an Exception from the general Rule laid down, and to the Limitation of the Power given to Presbyteries in the immediate proceeding



ceeding Act; so it can be no further extended than to the Case excepted. And 'tis evident, that Act was made for remedying an Abuse, that had crept in to the Church, at that Time, of Parsons and Vicars misbehaving themselves, or leaving their Cure, &c. after they were provided to such Ecclesiastical Benefices. And therefore the Act gives not only Synods, &c. but Presbyteries (who had Occasion to meet often, and that they might the sooner make a Purge) Power to deprive such, as had been admitted into Benefices since his then Majesty's Coronation; and not those, who should be admitted thereafter, nor those who had been admitted before; for they are particularly excepted. Nor did their Power extend to the Deposition of even those, who had been admitted since His Majesty's Coronation, if they had a Vote in Parliament, Council or Session. Therefore as that Act was only temporary and limited, and never renewed by any Law since that Time, no Inference can be drawn therefrom. But it rather confirms the general Rule, *Exceptio firmat Regulam in Casibus non exceptis*.

It might be as well pretended, from the Act settling Presbytery at the Revolution, that Presbyterian Ministers might now turn out Episcopal Ministers, *bre-vi manu*, out of their Churches; because that Act justified their Predecessors in so doing, and approv'd of their Right to the Episcopal Ministers Benefices whom they turn'd out in the Year 1689. For the Act 1592 has a Retrospect, and confirms the Sentences of Presbyteries, before Presbyterian Government was settled at that Time; as well as the Act 1690 gives Presbyterian Preachers Right to Episcopal Ministers Benefices, before Presbyterian Government was settled at the Revolution; yea, even before the Revolution  
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was brought about. For upon those great Occasions, it may be necessary to permit Things, which at other Times would neither be allowable nor convenient: And those are not to be drawn in Consequence.

3. The Appellants, with Submission, humbly contend, *That they are not at all subject to the Jurisdiction of any of the Presbyterian Judicatures*; not being of their Communion; and their Principles leading them to differ from them, both in Relation to their Mission, Ordination, Jurisdiction and several other essential Points, And being permitted to enjoy their Benefices, and exercise the Offices of their Ministry, by Act 27. Parl. 1695, and by the Act commonly called, *The Toleration Act*, they are exempted from any Jurisdiction inconsistent therewith.

*Object.* But say the Respondents, The Exercise of the Church Government being lodg'd in the Presbyterian Judicatures; and all Ministers without Distinction being subject to their Jurisdiction by Act 22. Parl. 1693. And the Act 27. 1695, Declaring such Episcopal Ministers only, as should take the Oaths, and behave themselves worthily in Doctrine, Life and Conversation, as became Ministers of the Gospel, to be under His Majesty's Protection. The same plainly supposes, that the establish'd Church Judicatures were to be Judges as to their Behaviour and Doctrine; for no other could pretend to judge of their Doctrine, or exercise any Ecclesiastical Jurisdiction. For it is Declar'd by Act 69. Parl. 6. *Ja. VI.* That no other Jurisdiction Ecclesiastical shall be acknowledg'd within this Realm, other than that which now is, or shall be within the established Church. And if there be no other Jurisdiction to be acknowledg'd, but that of the established Church, and yet Episcopal Ministers be free  
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of that Jurisdiction; they are liable to no Censures, and are under no Government whatsoever; but may be guilty of what scandalous Enormities they please, without Hazard of Punishment.

*Ans.* That altho' by the Act 1693, Episcopal Ministers were indeed subject to the Presbyterian Judicatures; and all Ministers were obliged to acknowledge and submit to their Government: Yet that Obligation is taken away by the Act 1695. And there was no Tye upon Episcopal Minsters thence forward either to submit to, or acknowledge the Lawfulness of their Government. And that Act declares, That all those, who had continued in their Churches, and had not complied with the Presbyterian Government, and who should qualify themselves by taking the Oaths, and behave themselves worthily in Doctrine, Life and Conversation, as became Ministers of the Gospel, should enjoy His Majesty's Protection, *i.e.* be under the Protection of His Majesty's Laws, so as only to be judg'd thereby. And that Clause is far from implying, that Presbyterian Ministers were to be Judges of their Doctrine, &c. any more than of their taking the Oaths: For, by such an Interpretation, the Intent of the Act would be totally defeated.

And it is evident, the Parliament of *Scotland* lookt upon the Indulgence of the Episcopal Clergy, as inconsistent with the Presbyterian Jurisdiction over those who were intitled to the Benefit thereof. For in all the subsequent Acts of Parliament, where the Presbyterian Government and Discipline is ratified; down to the Union, particularly the Acts, *Anno* 1700, 1702 and 1703, 'tis with an exprefs Reservation of the Allowance granted to the Episcopal Clergy by the Act 1695, as has been already shown.

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But further, 'tis an undeniable Principle, That where ever a Right or Privilege is granted by any Law; every Thing is presum'd to be granted, without which that Right cannot be executed: And all Explanations, Inferences or *Innuendo's*, that are inconsistent therewith, are to be rejected.

And I beseech your Lordships to consider, That Episcopal Ministers are exempted from joining either in Doctrine or Discipline, Worship or Sacraments, Practice or Opinion, with the Presbyterians. And how can they be their Judges in those Matters? For in that Case they behoov'd in Conscience to judge by a Rule, *i. e.* by their Principles, by their Consciences, and by Acts of Assembly. None of which the Appellants are, either in Law or Conscience, bound to obey or submit to.

And as to the Act 69. Parl. 6. *Ja. VI.* it seems to be very ill chosen for the Respondents Purpose. That Act indeed Declares, *That the only true Religion, and the only true Church, was that which, by the Favour of GOD was then established within this Realm; and that no other Jurisdiction Ecclesiastical should ever be hereafter, but what was within that Church.* But that Act either proves too much, or proves nothing at all. If that Act be in Force, there is little to be said for the Presbyterian Government. For every Body knows, the Reformed Religion, under Archbishops, Bishops, and Superintendants, was the only Religion and Government that was then established. And that very Act is made and voted by Bishops as One of the Three Estates.

At that Time, all Archbishops, Bishops, and other Prelats were oblig'd to sign that Confession of Faith, which had been voted and approv'd by themselves in

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Parliament. They had the Admission of such qualified Ministers, as were presented by Patrons to Benefices; and Power to order such Matters in the Church as were committed to their Ecclesiastical Cognizance. Presbyterian Government was not settled until King *James* His 12th Parliament, *Anno* 1592. And I cannot imagine, what Inference can be drawn from that Act, that makes for the Respondents. For if no Jurisdiction be lawful, but the Jurisdiction of the Church as established at that Time: Then the Presbyterian Jurisdiction must be unlawful, by their own Argument. If no other Religion was true, but such as agreed with the Religion then professed: Then all those new Doctrines, Practices and Opinions introduced since that Time are unlawful. And those, who adhere to the ancient Orthodox Principles and Government of the Church, are the only Church established by Law, still.

If we compare the Principles now professed with those owned at that Time, we may easily see, who has the best Claim to be of the Church meant by that Act.

The Reformation in *Scotland* was carry'd on upon the same Principles with *England*, and chiefly by *English* Influence. Many fled from thence to *Scotland* in the Time of Queen *Mary's* Persecution. And *Buchanan* and Dr. *Burnet* tell us of Seven of our Noblemen, and Twenty four considerable Gentlemen, who were enlightened by the Reformation in *England*. And as our Bishops and Clergymen had a great Hand in bringing it about in *Scotland*: So *Knox*, who was likewise very active in that Matter, makes Mention of Twelve or Thirteen of the Spiritual State, who had renounced the *Romish* Religion, and either sat in Parliament, or

were chosen to be *Lords of the Articles*, Anno 1560, when the Reformation had the first National Establishment. Among which were the Bishops of *Galloway* and *Argyle*, the Abbots of *Lundoris*, *Culrois*, &c. And *Buchanan*, speaking of the Duke of *Norfolk's* Conspiracy, gives us this Account, \* “ The Scots, some  
 “ Years before, being delivered from the Slavery of  
 “ the *French* by the *English* Assistance, had subscribed  
 “ to the Religious Worship and Rites of the Church  
 “ of *England*: And that surprizing Change in Affairs  
 “ seem'd to promise to *Britain* Quietness and Rest  
 “ from all intestine Commotions and Factions.” And *Knox*, in his History, with whom *Spotiswood* and *Petrie* agree, mentions an Edict by the *Lords of Congregation*, December 3. Anno 1557, whereby they ordered the Liturgy to be read, in all the Parish Churches within the Realm, on *Sundays* and other Festival Days, with the Lessons of the *Old* and *New Testament*, conform to the Book of *Common Prayer*. And this could not be the Liturgy or Common Prayer of *Geneva*: For there is no Vestige or Direction therein for observing Holy-Days or Festivals; or were there any particular Lessons of the *Old* and *New Testament* to be read by the *Genevan* Liturgy at that Time, that appears by an Edition thereof into any Language. Besides, that Archbishop *Spotiswood* and the other Bishops, who composed our Liturgy in the following Reign, tell us in their Preface to it, That it was then known, that for divers Years after the  
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\* Status rerum Anglicarum, hic, nos paulum divertere cogit, quod eo tempore, adeo utriusque regni prospera & adversa conjuncta erant, ut altera sine alteris explicari nequirent. Scoti ante aliquot annos, Anglorum auxiliis, e servitute Gallica liberati Religionis cultui & ritibus cum Anglis communibus subscripserunt: Ea subita rerum mutatio spondere videbatur Britanniam universam ab omni domestico tumultu conquieturam. E continenti vero, &c. *Buchan. Francof.* P. 675.



Reformation; we had no other Order of Common Prayer, but the *English* Liturgy. Be that Matter how it will, 'tis certain, the unaccountable Practice of rejecting all Liturgies never came to be own'd till the Time of the horrid Rebellion against King *Charles* the Martyr. And tho' the General Assembly, *Anno* 156-- wrote to their Brethren the Bishops of *England*, wherein they seem'd to except only against the Vestments, and that the *Genevan* Liturgy was some Years after the Reformation, set up in *Scotland*; yet it is certain, they had still a Liturgy, own'd the Lawfulness of Bishops and Superintendents, and did not profess the same Opinions either in Church or State, which some People now a-Days vouch to be the Principles of the only true Church, which was meant by that Act.

The later Doctrin of the Divine Right of Parity was so far from being maintain'd by our Reformers, that they approve of Imparity; and actually set up Imparity as the Government of the Church, which was so when this Act was made.

Can it be thought, that some People's Disclaiming the Doctrin of the King's Supremacy, which the Law so strongly asserted at that Time, proves them to be of that true Church?

Is it their Opposing themselves to the Sovereign Authority, *Anno* 1648? Their condemning and excommunicating Subjects for obeying His Majesty's lawful Commands, by giving their Assistance towards the Restoring His Majesty to the Exercise of his Royal Authority, from which he was so unjustly restrain'd; and which was not practis'd for long after that Act was made?

Is it their Usurping Jurisdiction over Bishops in their Assemblies, after their Government was abolish'd by

Act of Parliament? Their continuing to sit, after the King had discharg'd them under the Pain of Rebellion? and excommunicating Bishops for not submitting to their unlawful Authority? which they did not take upon them to do till the Year 1638.

Is it their denying the Lawfulness of Episcopal Ordination, and excommunicating Bishops and Archbishops for receiving Episcopal Consecration? Of which we have no Instance till the Time of King *Charles I.* the blessed Martyr.

Is it their condemning the Common Prayer-Book, the Liturgy of the Church of *England*, the Books of Canons, the Books of Ordination, &c.? All made use of more or less by Bishops and Pastors at that Time.

Is it their discharging the Reading of the Scriptures, and discontinuing the Use of the Lord's Prayer in Congregations, &c. practis'd by all Protestant Churches since the Reformation?

Is it their Abhorrence to that devout and decent Posture of Kneeling at the Lord's Table? their Aversion to the administering of the Sacrament to Persons Sick, or on Death-bed? their dislike to baptizing of Children, in Cases of Necessity, in private Families? or to Bishops and superior Pastors examining, confirming and blessing them in their Visitations? All which was long ago practis'd by Presbyterians, and approv'd of by General Assemblies posterior to the foresaid Act.

Is it their detesting to observe the Days of our blessed Saviour's Birth, Passion, Resurrection and Ascension? or against so much as to allow the Sacraments to be administrate on those Days, that intitles them to be the only Members of that true Church, whereof those Acts of Parliament make Mention?

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Are these, and many other Doctrines and Opinions newly broached, since the aforesaid Act was made, to be put upon us as Characteristicks of that true Church pointed at there? No certainly: For I'll be bold to say, they are neither warranted from the Law of GOD, nor from the Laws of the Land. For I'll say nothing, that it is inconsistent with either.

Seeing then the Appellants differ from them in these and many other essential Points, 'tis against all Reason, that they should be subject to their Jurisdiction either as to their Practice or Opinion, Doctrine or Discipline, Worship or Sacraments. For their being permitted, tolerated and protected, would be of no Manner of Use to them in that Case.

It is easy to imagine, if the Presbyterians were Judges, what Doctrine they would deem Erroneous, what Devotion they would look upon as Superstitious, what Worship they would censure as Idolatrous, and what Ordination they would Esteem Unlawful. For the Appellants stand already condemned in all these Matters by the Acts of General Assemblies. And are those to be the Appellants Judges? No: I hope, your Lordships will find their Jurisdiction extends no further than to the Members of their own Kirk.

They need not seek a Repeal of the Toleration-Act in *Scotland*, which is so grievous to them; If they may put what Glosses they please upon it; If they can censure, depose and incapacitate those, who are intitled to the Benefit thereof: There's an End to it with a Witness. And by that Means they would make more Atheists in one Year, than they have made Converts these Twenty nine Years bypast. For as they make no Profelytes that Way, your Lordships may depend upon it, the better Sort of People will rather be of



no Communion than of theirs, pretend what they will.

He who would usurp an absolute Tyranny over any People, need not put himself to the Trouble and Difficulty of abrogating the Laws, made to maintain the common Liberty. For he may frustrate their Intent, and compals his Design as well, if he can get the Power to interpret them, as he pleases, and have his Interpretation stand for Laws. If he can rule his People by his Laws, and his Laws by his Inclinations, he accomplishes his Design effectually.

But further, the Church Judicatures were not Judges of the Crimes laid to the Appellants Charge; for all Treason and Treasonable Practices and Offences against the State are only cognoscible by His Majesty's Judicatures, and are not intrusted to others: Neither can they judge thereof under Pretence of Scandal, as is clearly made appear in the annexed Case; and that Ecclesiastick Judicatures have only Power to judge of such Scandals, as are *mala in se*, not *mala prohibita*, thole that are against the Divine and Moral Law, which *semper & ad semper*, at all Times and upon all Occasions are unlawful. Such only as Christians of all tolerate Professions agree to be Scandalous: Not such as one esteems to be Scandal, (as the Presbyterians do the Practice of the Liturgy) and others a Duty: Not such as arise from the Transgression of every Moral Duty; For all Sins may at that Rate be extended to Scandals, and Persons forfeited therefore by the Church: But only where the Laws of the Land declare such Facts to be Scandalous, and such Scandals to infer Forfeiture. Nor are they Judges of Scandals against the King, His Government, His Judges or His Nobles: All which properly speaking,  
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are *Scandala Magnatum*; for His Majesty reserves the Punishment of those to His own Judicatures.

For it may be laid down as a Principle, that no Scandal can fall under Ecclesiastical Cognizance, but such as arise from Actions that are both sinful in themselves and censurable by the Church. For tho' an Action be sinful in itself; yet, if the Church has not sufficient Power to censure the same, 'tis no Imputation upon the Church or Scandal to Christianity.

It was no Imputation upon our Saviour, that his Kingdom was not of this World, that he was not a Judge of *Cæsar's* Title, of the Adulterers brought before Him, nor in the Division of the Inheritance betwixt the Two Brothers. Far less can it be an Imputation upon the Church now, who can pretend to no greater Power than our Saviour assumed, that she cannot determine the Rights and Titles to Crowns and Dignities, and whose Possession is just or unjust.

Seeing then it can be no Scandal or Imputation upon the Church, that she cannot censure any Transgression, which she has not sufficient Authority to punish or censure; and that she has no Power or Authority to punish such Transgressions as are only against the Common Law: Nor indeed can she make that a Sin, which the Law of GOD has not determin'd to be so, as that of praying for the Pretender, tho' no Doubt 'tis against the Law of the Land; nor is she Judge of the Bounds or Limits betwixt the Sovereign's Authority and the Subjects Obedience, or of the precise Cases wherein Resistance is lawful or unlawful. It is against all Reason for her to pretend to impose a Censure or Punishment on such Actions or Crimes, of which she is not the Judge, and of which she cannot determine in a judicative Way, whether such Action be sinful or not sinful.

It will be in vain to prove, that if the Church cannot judge of Treason, *That is*, if she cannot judge of an Action whether it be treasonable or not, she cannot judge of the Sin or Scandal arising from that Action; for that is evident to the meanest Capacity.

If the Church pretends a Power to punish or censure Treason or treasonable Practices, or any Transgression against the common Law; she must derive that Power from our Saviour and his Apostles, or from the Laws of the Land. But she can show no such Authority from either that will justify her Proceedings in the present Case.

2. Those Sins or Actions, that fall under Ecclesiastical Cognizance, are such as the Church by the Laws of GOD alone, without the Intervention of any secular Laws, can determine to be sinful or not sinful; and not those Actions which require the Consideration and Knowledge of Temporal Laws, Customs, Contracts, or Constitutions. Seeing 'tis by those, and not simply by the Law of GOD, that Mens Rights and Titles to Estates and Dignities, the Lawfulness of praying for this or that Prince, or the like, are to be determin'd, and not from the Texts of Scripture. For tho' an Error in Mens Conduct and Behaviour in those Matters, may be a very heinous Sin: Yet since it is not to be judg'd solely by the Scriptures, but by the Laws of the Country. Such an Error is no Heterodoxy in Divinity, nor Heresy in Religion, cognoscible by the Church; but proceeds from the misapplying or not understanding of the Civil Laws or Constitution, the Punishment of which falls only under the Cognizance of the Civil Magistrate.

If it be *pretended*, that the Laws of the Land have declared what is Treason, and what is not, and that the Church-



Church-Judicatures judge only conform to the Law, and therefore may apply the Spiritual Censure, tho' she may not impose the Civil Punishment. I answer, That if the Spiritual Censures of the Presbyterian Kirk had no Temporal Effects, the Appellants would be very easy about them. And that tho' the Law of the Land has determin'd what is Treason; and what is not; yet the Application of that Law to particular Cases is left to secular Judges. For the Construction and Application of any Law, which is to be determin'd by any other Rule than the Scriptures, is not committed to the Church, who are not presum'd to be versant in the Knowledge of secular Laws, which is necessary to determine, who have Right to govern, and who are to be prayed for in the publick Offices, and the like: For those Laws are temporary and mutable. Whereas the Law, by which the Church is to determine, is perpetual and unalterable.

This does not hinder, that when a Scandal is publish'd, or a contagious Sin committed, any Subject, who has a Zeal to prevent the Mischiefs spreading, may apply to the proper Magistrate, to suppress it: And, if inferior Magistrates neglect their Duty, may carry the Complaint against them and it to their Superiors. But is it to be endur'd, in a *British* Government, under Pretence of Scandal, to set up Tribunals, Committees of Synod forsooth, who have not the least Authority of Law? where Mens Liberties and Freehold are to be try'd, even by Judges that were never so much as qualify'd to the Civil Government, and who are neither acquainted with the Letter nor Language of the Law. To authorize such a Precedent for the Independency and Jurisdiction of the Church, might very soon come

to devour both the Jurisdiction and Supremacy of the State.

Nor are Episcopal Ministers free of Censure or Punishment, if they commit Enormities, as is pretended. For as the Law can, and will, punish them: So the Censure of those of their own Communion, which was all that the Primitive Christians had, not only binds their Consciences; but if they should condemn the same, no Man of their Communion would ever thereafter hear or regard them.

The famous Presbyterian, Mr. George Gillespie, tells us from *Lavater's Book, de Ritibus & Institutis Ecclesie Tigurinæ*, That the *Helvetian Churches* have the Notes, Words and Sacraments, tho' the Order of Discipline be not settled among them; and that there is even no Excommunication, or any Suspension of Scandalous Sinners from the Sacraments in the Church of *Zurich*. And every Body knows, there are several free Chapels in *England* wholly exempted from the Jurisdiction of any Bishop, and only subject to the Visitation of the Lord Chancellor: Yet, I hope, 'twill not be alledg'd, Their Pastors are exempted from all Punishment, if they be guilty of any Enormity. And it does not follow, because Presbyterian Judicatures cannot punish Episcopal Ministers, that therefore they cannot be punish'd. One might as well argue, That *Canterbury* is not the Way to *London*; therefore there is no Way to *London*: Or, That a Man is not a Horse, therefore he is an Ass.

*Object.* But say the Respondents, The establish'd Church is the fittest to determine the Extent of such Offences: To which I answer, That they who think the Law is not fit to determine the Extent of any Crime, such as that of praying for the Pretender, &c. must either

either want Understanding themselves; or think, that the Words of the Law want it; and that the Kirk is a better Judge in that Matter, than either the Legislature, or established Judicatures. Which when they are able to perswade your Lordships of, then, and, I hope, not till then, will their Sentences meet with the Approbation and Sanction of the Civil Powers.

Can any Principle be more just and true than this, That wheresoever Persons of different Perswasions are permitted to enjoy the Exercise of their Religion; no Ecclesiastical Judicature of any one of these Perswasions is fit to pronounce Sentence in Religious Matters for all of them. But in all Offences in that Case, Recourse must be had to the Laws of the Land, which are binding upon every Man.

Law, by which Men are to be judg'd, derives its Being and Efficacy from common Consent. And to put it upon any other Foundation, is to take away the Obligation, that People have, of common Consent to observe the Law: And instead thereof to set up a Fantastick Scheme to rest the Authority of the Law upon the Opinion of any Set of Men, who, under Pretence of Religion, blend Questions of Divinity with Questions of Law, when 'tis plain, Religion has nothing to do with it, is the Way to overturn all Order and Government. Churchmen have nothing to do with the Transgression of secular Laws, nor with the Authority of the Prince, or the Obedience of the Subject, further than to secure the legal Authority of the One, and enforce the due Obedience of the Other, from the Consideration of higher Rewards and heavier Punishments. But to extend their Power to determine in a Judicial Capacity, in all emergent Cases, the Right of



the One, or the Limits of the Other, can never be justify'd.

It the Scriptures and Laws of the Land be sufficient to inform us what is the Will of GOD and Decrees of the Legislator, it must be sufficient to teach us, what is Criminal and what is Sinful, what is Orthodox and what Heretical. For Error is nothing but a Deviation from and Opposition to the Faith: And that which is streight, will show what is crooked. What Occasion is there then for recurring to the Presbyterian Church, (as the Papists do to that of *Rome*) for their Interpretation. For could we suppose, that the Laws are neither plain, nor perfect, how can the Presbyterians presume to impose Glosses of their own upon them even against those of a different Communion? Seeing the only Measure of the Prince's Authority and the People's is the Laws of the Land explain'd and apply'd by the Sovereign Judicatures.

*Object.* But the Respondents further urge, That by a Clause in the 22d Act, Parl. 1693, all Civil Magistrates are ordered to give their Concurrence for making the Censures and Sentences of the Church effectual. And by the 22d Act of the Parliament 1695, intituled, *Against intruding into Churches, &c.* all Sheriffs, Stewarts, Baillies of Regality and their Deputies, and Magistrates of Burghs Royal, are ordered to pronounce Decrees or Sentences for compelling such Intruders to remove. And it is recommended to the Lords of Privy Council, to take some effectual Course for hindering those Ministers, who are depos'd by the Judicatures of the Church, from preaching or exercising any Act of their Ministerial Function, which, says the Act they cannot do, after they are depos'd, without a high Contempt of the Authority of the Church and of the

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Laws establishing the same. And therefore the Sentences of the Presbyterian Judicatures, deposing the Appellants, are to be made effectual by the Civil Magistrate.

*Ans.* 1. When those two recited Acts were made, Episcopal Ministers were indeed under the Jurisdiction of the Presbyterian Judicatures. And as at that Time all Ministers, possessors of any Churches, were bound to submit to, and acknowledge the Lawfulness of their Government: So no Doubt their Sentences, in so far as they were warranted by Law, were to be put in Execution by the Civil Magistrate. But His late Majesty, King *William* of glorious Memory, perceiving the ill Consequences, which had attended the Severities us'd against Episcopal Ministers; and being resolv'd to make himself King of His People (and not of a Party) by engaging their Affections to His Government, and allowing His Subjects of the Episcopal Communion, who were the greatest and most considerable Part of *Scotland*, the Exercise of their Religious Worship in their Congregations, and their Ministers Protection in their Civil Rights and Benefices, did, by an Act bearing Date the 16th of *July* 1695, exempt them from their Subjection to the Presbyterian Government, which is posterior to both the former Acts.

2. Suppose the former Acts had been in Force against the Appellants, as they were not: Yet they were to be taken *civiliter non Judaice*; for no Sentences nor Censures could be understood thereby, but such as were final, and not those under Appeal; only such as had been approv'd by the Civil Judicatures, as the Law appoints, and not such as were under Review, and a Process of Reduction and Declarator for voiding thereof actually depending, as there was in this Case. For the Act

Act says, The Civil Magistrate is to make the same effectual only as accords, *i.e.* as they were legal, final, warrantable, &c.

3. It could only be Sentences in such Matters as by the Law are committed to their Cognizance and Execution. For, if they should pronounce a Sentence of Divorce, declare the Legitimacy of a Marriage, confirm a Testament, or pass Judgment upon Treason, or upon *Scandala Magnatum* against Peers, or other Scandals against Magistrates or Judges, who are under the Protection of His Majesty's Courts; much more on those committed against His Majesty Himself: Can any Man imagine, that the Civil Magistrate is to approve of such Proceedings, except in so far as they are warranted by Law?

4. The Concurrence of the Civil Magistrate is only to be given for making effectual such Sentences, as are consonant to the Laws of the Land, and to the Rights and Privileges of the Subject, and pronounced against Persons within the Bounds of their Jurisdiction. For, if the Presbytery of *Aberdeen*, *e.g.* should depose a Minister in the Presbytery of the *Mearns*, without the Bounds of their Diocels, as they did Mr. *George White*; Or, if they should depose a Presbyterian; as they did an Episcopal Minister (when they had Jurisdiction over them) for the Scandal of Dancing about a Bonfire, when it was prov'd, there was no Bonfire in Town at that Time; Or, if they should ordain Witnesses to appear as Evidences in a Process in Order to Excommunication, as they did in the Appellants Case, for that was the only natural Tendency those Processes against them could have had, the Appellants being, as they call it, contumacious by refusing to answer to their Church Judicatures: Is it  
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to be thought, that such Sentences or Proceeding are implicitly to be approv'd of? Or, That now when the Law is so far alter'd, that Civil Magistrates are prohibited to give any Disturbance to the Episcopal Clergy, or to give their Concurrence for making effectual even the highest and greatest Censure of the Presbyterian Kirk, yet still they are bound to run on all their idle Errands, and to execute the Sentences of their most *puisne* and meanest Judicatures, even against Persons of a different Communion which many Times are such as neither in Law nor Conscience can be justified?

It is usual, for Presbyteries to declare the Churches of Episcopal Ministers vacant, (as they did Mr. *Lyon's* Minister at *Kinghorn*) before they accuse them of any Crime, summon them to answer, or lead any Probation against them. And are Civil Magistrates to make such Sentences effectual? *Credat Judæus Apella*. Some indeed of the Justices of Peace and Lieutenants of the Counties have been so much at their Beck, as to put those Constructions upon the Law; but they have not found all of that Opinion.

There were in one County Seven, who would not bow their Knee to *Baal*, I mean, those worthy Gentlemen, who were Justices of Peace for the Shire of *Aberdeen*, who since have been put out of the Commission on that Account, to wit, Sir *Alexander Cuming* of *Culter* their Preses and Representative in Parliament, Sir *Alexander Burnet* of *Leys*, the Laid of *Skene*, Colonel *John Middleton* who represents the Town of *Aberdeen* and that District of Burroughs in Parliament, Mr. *Arthur Forbes* of *Shivas*, Captain *John Stewart* of *Dennis* and *John Ferguson* eldest Baillie of *Inverury*. I hope, those Gentlemen will pardon my naming them

on this Occasion, their Proceedings in this Matter adding both to their Honour and Character, in the Opinion of all good Men ; seeing they had the Courage and Honesty to make a Stand for the Constitution, and to condemn the false and scandalous Epithets given them by some ( who long ago were noted for Calumny and Lampoon, and who did not even spare those whose Sex, Virtues and Innocence ought to have protected them from his Insolence ) who represent them as Encouragers of the Enemies of the Government, striking at the State thro' the Church, *Jacobites* and what not ? And particularly, the Author of the Letter inserted in the *Flying Post*, *January 14.* last past, supposed to have been writ by one who had sometime before preach'd and chose a Text, *Jude 4.* for that Purpose. How he wrested and perverted the Sacred Scriptures upon that Occasion, his Auditors can give the best Account ; and it is not worth the While to enquire into it. However the Proceedings of those worthy Gentlemen, who have always given the greatest Proofs of their Affection to the Government, will justify themselves, and appears nevertheless, that they refus'd to make use of that Authority, which His Majesty had put in their Hands as a Mean to invade the Liberties of His Subjects, to countenance Encroachments upon the State, and make Way for the Usurpations of the Kirk, and which is worse against both their Consciences and Conviction.

It is unmanly to destroy an Enemy unarm'd, because perhaps it may be done with Impunity : But it is unchristian, when we represent GOD, as Judges ; for then we endeavour to make him the Author of our Unjustice and Cruelty. A Man revenges himself meanly, who, to ruine his Enemy, destroys his own Soul, and tashes his Reputation.

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Tho' 'tis doing too much Honour to the Poorness of that Author's Detraction to take notice of it: Yet, I hope, your Lordships will pardon it, being in Relation to a Part of the Proceedings in the present Prosecution.

I feel a Struggle between Contempt and Indignation at the scandalous Author, who describes a Composition of Rancour and Falshood, intermixt with Cant and Calumny, rais'd and spread against the Conviction of the Inventers themselves, and pretended only to be believ'd by those who abhor the very Being of one, that dares open his Mouth in Defence of a Regular Churchman, and who compass Heaven and Earth to set up their own insupportable Pride, Malice and Revenge, even upon the Ruine of Christianity and their Country.

The candid and ingenuous Author of the Letter introduces it with a great Deal of pretended Zeal for the Government, and Impartiality even towards those of his Communion. And as an Instance thereof, he says, after the quelling of the late horrid Rebellion, the Church began and depos'd two of their own Members, for their Deportment and Behaviour during that Time, meaning the two Mrs. *Maitlands*, Ministers at *Forgue* and *Inverkeithney*. But it appears by the Criminal Indictment now in Debate, and by the Sentence against those two Ministers, that they were depos'd in 1711--, which was confirm'd by the General Assembly in May 1715, before the Rebellion began. And is not this a mighty Instance of their Justice and Impartiality, as well as their Foresight, that they could thus in May 1715 depose them for their Practices, during the Rebellion, so long before the Rebellion broke out, and make the first Examples of those Gentlemen of their

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own Communion, who had left their Communion and taken Episcopal Ordination before ?

The Author might have added another Instance of their impartial Zeal, in deposing Mr. *Hunter* Minister at *Bamff*, one of their own Number, for his Behaviour at that Time. Indeed it was not for his Preaching, for he preach'd none, during the Rebellion ; nor his praying for the Pretender, for he was not suffered to exercise his Ministry all that While. But he had committed a greater Crime according to those People ; for he had educated his Son at *Oxford*, and he himself being by open Force restrain'd from the Ministry, his *Oxonian* Son presumed to assume his Pulpit and preach, during those Commotions.

If the Respondents had been resolv'd to show the World an Instance of their Impartiality ; seeing they took upon them to judge Episcopal Ministers for the Transgression of Acts of Parliament (the Punishment of which was only committed to the Lords of Justiciary) and not only so, but to transmute the Punishment from 20 *lib.* to Deprivation, as in the Case of neglecting to pray for King *George*. Why did they not depose one of so many of their own Number, who not only forbore praying for him during the Rebellion, but did it in Obedience to the Pretender's Proclamation ? But I am not resolved to follow that Author in all his Extravagancies.

The Matter then brought before those Justices of Peace, was Complaints and Processes at the Respondents Instance against the Appellants for *Intrusion* into their Churches, in so far as they continued to preach therein, or in the Parishes, and to possess their Houses and Glebes (which the Appellants had both before and since the Revolution : ) And their having so possess'd,

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notwithstanding of their being depos'd by the Presbyteries, &c. they alledg'd was an Invasion and Intrusion upon the Rights of the Respondents, who, they say, were settled in their Places. But did not alledge any Act of Force or Violence, or any Riot or Tumult made by the Appellants, or the least Disturbance given to the Civil Government thereby.

The Justices of Peace having considered, and carefully examin'd the Acts of Parliament, by which it appear'd, that the Matter of Intrusion libell'd was not committed to their Cognizance; but the Execution of the Act beforecited expressly appointed to be by other Judicatures; and that Intrusion in itself imports no Violence but Wrong, both by the Common Law and the Act of Parliament beforecited: *Nam intrusi dicuntur, qui non per electionem canonicam occupant honores, officia, vel ecclesiastica beneficia.* And by the Act of Parliament 1695, it is described to be the Entering into vacant Churches, or possessing Manse, Benefice, &c. without an orderly Call and legal Admission, which, as the Law imports, may be done without Violence; as by entering *in vacuum alterius possessionem sine vi publica, utputa dolo, vel nullo Judicis decreto. l. ult. Codicis. Unde vi.* Which behov'd to be much more so in this Case, where the Appellants were not entering into another's Possession, but retaining their own, which they had by a legal Title enjoy'd for so many Years, and which the Respondents had never by any Authority of Law divested them of, nor the Appellants ever yielded up: For as, *Nulla possessio acquiri nisi animo & corpore potest; ita nulla amittitur, nisi in qua utrumque in contrarium actum est. l. 8. Digest. De acquirenda vel amittenda possessione.* So that according to the first Principle of Government, which is the Preservation of

every Person in their Possession, from whence they are not to be turn'd out without Order of Law, and upon that Basis the publick Peace is founded; the Justices of Peace were obliged to adhere to that Fundamental Principle, until the proper Judicatures should determine the Competition betwixt the contending Parties. Seeing they themselves were by no Means competent to take Cognizance thereof, or to judge betwixt the Appellants Right and ancient Possession founded upon the Laws of the Land, upon Acts of Parliament, Acts of Indulgence, Acts of Prescription, Acts of Toleration, &c. And the Respondents founded upon Sentences, pronounc'd by themselves in their own Favour, in Absence of the Appellants, by Judicatures not authoriz'd by Law; and for the most Part proceeding upon Presumptions, Inferences and *Innuendo's*, deduced from disjoin'd and independent Propositions, drawn from uncertain Premisses and more uncertain Conclusions, without legal Proofs in Matters that were in themselves Treasonable, and not subject to Ecclesiastical Cognizance: And which, tho' they had been true, were alledg'd to have been pardon'd by His Majesty's most gracious Indemnity. And they thought, it would be Presumption in them to explain and limit His Majesty's so Gracious and Acceptable Act of Grace (which was order'd to be interpreted in the most beneficial Sense) so as to exclude the Appellants from the Benefit thereof? And that our Saviour's Saying upon the like Occasion, *Luke 12. 14.* might be very well apply'd to this Case: For who made them Judges over Intruders? And therefore upon the Whole they sustained the *Demurrer*, or Declinator, made by the Appellants against their Jurisdiction in that Matter of Intrusion. But declared, If any Riot or Breach of the Peace were offer'd to be prov'd,



prov'd, they would proceed to cognosce thereupon. But the Respondents, having nothing to pretend of that Nature, thought fit to enter their Proteſtations againſt the Juſtices Proceedings, and to intent the Criminal Libel before the Lords of Juſticiary, upon which the Judgment now complain'd of was pronounced.

And as an Evidence of this, and of the Falſhood of that common Calumniator, who ſays, That the Juſtices reſuſed to cognosce any Riot, and to ſecure the Offenders to the Peace, or to take notice of thoſe who continued to diſſeminate Treasonable Doctrines, to pray for the Pretender, and to neglect praying for His Maſteſty King George ſince the Indemnity; I muſt beg the impartial Reader to look but over the Criminal Libel before the Lords of Juſticiary, after the Juſtices of Peace had reſuſ'd to ſuſtain themſelves Judges in thoſe arduous Matters (which I on Purpoſe have inſert at large) whereby it will appear, 1. That there is not one Circumſtance of a Riot, Tumult or Breach of the Peace pretended to have been committed by any of the Appellants. 2. That there is not one Word in the Libel of the Respondents requiring the Appellants to be bound to the Peace, or their ſwearing the Peace againſt them. 3. That in all the Libel it is not ſo much as alledg'd, That any of the Appellants had ever diſſeminate Treasonable Doctrines among the People at any Time, even during the Rebellion (unleſs what is aſſerted, *gratis dictum*, by the Preſbyterk-Clerk, of ſome of them having prayed for the Pretender, may paſs for ſuch) far leſs after His Maſteſty's moſt Gracious Indemnity. 4. Nor does the Libel ſo much as charge them with praying for that Perſon, or even neglecting to pray for His Maſteſty King George in expreſs Terms ſince the Indemnity. For thoſe indeed had been ſufficient Grounds  
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for a Criminal Impeachment; and the Respondents, who wanted not Inclination enough, would very readily have laid hold on them, if they had been true. Now it is left to all impartial Men to judge, how the Author of the Letter has made good his Charge against those worthy Justices; and how a Man, thus catch'd in so gross a Prevarication, can ever hope to be believ'd when he is in the *Chair of Verity*. For this is so shamefully Scandalous and so scandalously Shameful, that 'tis difficult to find a Name to it.

As to the Circumstance of the Preses taking two Votes, *viz.* First a Vote as a Member, when the Rolls were call'd over by the Clerk, upon the Question, *Sustain, or not sustain the Declinator?* And thereafter, when the Votes were equal, assuming a casting Vote, which, says the Author of that Letter, is not customary; and that the other Seven Justices of Peace protested against it. But as this last is manifestly false; for no more than Three made such Protestation: So he bewrays his Ignorance in the other. For let him among other Precedents consult the Practice of the House of Lords, the Practice in the Elections of Knights for Counties, the Practice in the Elections of Burgesses for Districts, as well as the Practice of Justice of Peace-Courts in other Places, where he will find, that the choosing of a Person to be Preses, does not bar him from his Privileges of voting as a Member, tho' he cannot pretend to a casting Vote as Preses, but in the Case of Equality. And suppose, the Preses had only taken his Vote as a single Justice of Peace, the Votes being equal, the Matter had stood as it did. For in that Case, *Potior est conditio prohibentis; & in dubio semper præsumitur pro negante, semper præsumitur pro reo, semper præsumitur pro libertate, semper præsumitur pro possessore,*  
*semper*

*semper praesumitur pro innocentia ; & unusquisque praesumitur bonus, & culpa nunquam praesumitur.*

To dispatch this scandalous Letter, whose Falshoods may for Number contend with its Paragraphs ; which was only intended to delude the Ignorant, to inflame the Clamarous, and to reproach those worthy Patriots, who were far from any such pernicious Design, as is insinuated, *viz.* of encouraging the Enemies of the Government, of licensing Treasonable Doctrines, of keeping up a Spirit of *Jacobitism* and of countenancing the Disturbers of the publick Quiet, (for which the Publisher of that Letter ought to be prosecuted, if that would avail any Thing, before Judicatures, where cursing the Queen in Her own Time, and even His present Majesty since, has been adjudg'd not above the Penalty of Ten or Twenty Merks;) the Conclusion is a fit Cover for such a Dish. We are told of the great Hardships the Church suffers for her Adherence to the State. But every Person knows, upon what Side the Sufferings are; and that the Oppressions of the Kirk have been more a dead Weight upon the State, and occasion'd more Enemies to the Government, than all the other Motives put together.

But those Justices of Peace being now out of Commission, which they more willingly part with than they accepted of it, I will advise them, and more particularly the first Three, who are Neighbours and Kinsmen, and who live in the Country, and have not the Advantage of seeing their Brethren so often as they could wish, to whom I will add a Fourth, *viz.* the Laird of *Drum*, who is likewise out of the Commission, (for 'tis pity to divide them, whose Ancestors have been for so many Hundreds of Years together) that they meet frequently at one another's Houses, and solace them



themselves over a Cup of good Liquor, and thank Providence, that they have escap'd so easily for so great a Trespas. Only seeing by the laying aside of those Gentlemen, who possess a great Part of that Corner of the Country, from the *Liberties* or *Freedom of Aberdeen* to *Cromar*; and that there are no Justices of Peace on all that West-Road towards *Brasmar*, living in that Country for Fifty Miles together; and that generally speaking, the Persons nominate in the new Commission, who reside there, and who have accepted, or will act in Conjunction with such a Fraternity, either have no Estates at all, or are so dispers'd, and indeed so unequal to that Trust, that by such a Nomination the Country is left expos'd. I must therefore further recommend to all the worthy Gentlemen of that County, who have been left out of the last two Commissions, and who, as being for the most part of the best Quality, the greatest Estates, the most ancient Families and most eminent Qualifications, and consequently have the greatest Weight in the Country, that tho' they have not the Authority of the Government to enable them to suppress Thefts, Robberies, Depredations, &c. as they might: Yet seeing they have Jurisdiction enough within their own Bounds as Barons, that they continue to show their Concern for their Country, by their Care in preserving the publick Peace, under His Majesty's most Gracious Administration, by their Zeal for suppressing Vice and Immorality, and their Diligence in enforcing the Obedience of the Laws by such as are within their respective Precincts. Begging Pardon for this Digression, I return to the next Ground of Appeal. Which is,

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The Fourth Reason for Reversing the foresaid Judgment, *viz.* Because the Lords of Justiciary pronounced Judgment upon Sentences of Presbyteries and Committees of Synod, that were not only void for the Reasons aforesaid, but iniquous in themselves. In respect,

1. They proceeded to examine Witnesses, and to judge, forfeit and incapacitate the Appellants in their Absence, contrary to the known Law. For all that they could have done in such a Case, albeit they had been their proper Judges, was to have suspended them for their Contumacy.

2. They committed Iniquity in prosecuting a Crime said to have been committed by Words, spoken by the Appellants, in their preaching and praying, without any Information thereof upon Oath, within Three Days after such Words spoken; or any Prosecution thereupon carried on within Three Months thereafter: Which is the Time limited by Law for such Prosecutions; as appears by the Act, *Anno 6. Reginae*, intitled, *Act for the Security of Her Majesty's Person and Government*.

3. That the Sentences pronounc'd against the Appellants were all null for want of Probation; there being no concurring Proof as to the Time, Place or Circumstances of any of the Articles laid to the Appellants Charge. Besides, most of the Witnesses, that were examin'd, were compell'd to compear, contrary to the Act, *Anno 10. Reginae*, intitled, *Act against Disturbing those of the Episcopal Communion, &c.* By which, all Judges and Magistrates are prohibited to force any Person to compear in any Process, in Order to Excommunication;

nication; which was the only Tendency this Process could have had, the Appellants being contumacious, in refusing to subject themselves to their Jurisdiction, as has been observed: And they being so illegally compelled to depose against the Appellants, their Testimonies are void in Law, and consequently all the Sentences proceeding thereupon.

4. That the Sentences are pronounced by the Pursuers, who were both Judges and Parties, and who now claim the Benefit of their own Sentences to intitle them to the Appellants Livings, tho' they were, *ipso facto*, incapable by not taking the Oaths. And those Objections and Nullities being propon'd before the Lords of Justiciary, with several others more fully contain'd in the former Case, which their Lordships were pleas'd to have no Regard to, their Judgment ought therefore to be revers'd.

The Fifth Reason of Appeal is, That the Lords of Justiciary sustained Process, and pronounced Sentence upon a Crime said to have been committed by the Appellants, by their not obeying the Sentences of the Presbyteries and Synod pronounced against them for Crimes indemnified by His Majesty's most Gracious Act of General and Free Pardon. And therefore the not obeying those Sentences for Crimes pardoned and indemnified as aforesaid, could be no Crime in the Appellants.

The Crime laid to the Appellants Charge, whether they were Treasons, Misprisions of Treason, seditious Words, Contempts, Offences, Trespasses, Entries, Wrongs, Misdemeanours, &c. by which any Man could incur any Penalty, Forfeiture or Incapacity, are so fully



fully pardon'd by this Act of Parliament, and all Persons prohibited to vex or inquiet any of His Majesty's Subjects for any such Matter, Cause, Contempt, Misdemeanour, Forfeiture, Trespass or Offence, &c. that it is impossible to deny, but that the Appellants are fully comprehended in the general Words thereof.

But still the Respondents make two *Objections* of a very different Nature against this Act. The *One*, acknowledging His Majesty's Power of indemnifying the Crimes, said to have been committed by the Appellants: But alledged, Their Case was excepted by a particular Clause in the Act. And the *Other*, denying that His Majesty could pardon the Censures of the Church-Judicatures. I shall consider these Objections separately.

The Clause insisted upon, for proving that they are excepted, is in these Words, *Provided always, That this Act shall not extend to give or restore any Ability or Capacity to take, have, hold, or exercise any Office, Place, Authority, or Employment, Ecclesiastical, Civil or Military, to any Person or Persons, who, by Vertue or Reason of any Act or Law whatsoever, were or are made, or are become incapable or disabled to have, take, hold, or execute the same; but all and every such Person and Persons shall remain and continue under all and every the Disabilities and Incapacities aforesaid; Any Thing in this present Act to the contrary notwithstanding.*

To this Objection it was answered, That the Exception does not at all meet the Appellants Case; but is *verbatim* the same with a Clause in Her Majesty's late Act of General and Free Pardon, *Anno 1708*. And has only Relation to such, who by express Law were disabled to enjoy their Offices, as many Persons both Civil and Ecclesiastical are; and among others the

Respondents for not taking the Oaths. And this Clause has been interpreted not to extend to any Case, where the Law or Acts of Parliament do not expressly declare such Forfeiture or Disability in all the Courts in *England* where the Law was made.

For there is a plain and manifest Difference betwixt being disabled and incapacitated by an express Act or Law and the Transgression of any Act or Law. For the One is Declaratory of it self; and is, *ipso facto*, a Forfeiture, and requires the restoring the Person, so forfeited, before he can enjoy the Office. Whereas the other is only the Ground of a Forfeiture upon Trial and Conviction.

As this Difference is obvious in itself; so it is evident from this Act. For such Forfeiture or Disability, as any Act or Law declares to be an Incapacity to hold or enjoy any Office, is expressly excepted, for there *Lex est lata*, Sentence being already pronounced by the Parliament. Whereas such Offences and Misdemeanours, as were committed only contrary to any Act of Parliament, or to any Law of the Realm, as all the Treasons and Offences, during the late Rebellion, were, are only *sub modo* excepted, *viz.* in Case the same was so far prosecuted, that on, or before the 15th Day of *July*, 1717, any Verdict, Outlawry, Conviction, Judgment, Sentence or Decree was, had, given, or entred in some of His Majesty's Courts, or before any Commissioner of His Majesty, &c. thereupon. So that if no such Sentence was made, or entred as aforesaid, tho' there were both Crimes, Misdemeanours and Treasons against both Laws and Acts of Parliament, the same is fully pardoned. And as neither the Presbyteries, nor Committees of Synod, nor any other Ecclesiastical Judicature, in *England* or *Scotland*, can pretend to be  
any

any of His Majesty's Courts, in which such Sentences or Judgments were entred, past or recorded, the Appellants Case is not comprehended under any of the forelaid Exceptions. And 'tis strange, that seeing Presbyteries, or Committees of Synod, will pretend to pass Sentences of Forfeiture, by virtue of any Act or Law, that they should deny His Majesty's Judicatures, the Power of considering the Grounds in Law, upon which those Sentences are founded, at least before they add the most cruel and severe Sanction to them.

*Object.* But the Respondents say, *Tho' His Majesty's Act of Grace does fully indemnify all Civil Penalties and Forfeitures under several Exceptions; particularly One, as to all Sentences pronounced in His Majesty's Courts: Yet as to Sentences of Church-Judicatures, pronounced in Matters Spiritual, those cannot fall under the Compass of an Indemnity. 'Tis His Majesty's Prerogative, in whom the Execution of the Civil Law is lodged as the Fountain, to dispense with the Penalties of them. But as the Execution of the Spiritual Law, as to Spiritual Effects, is committed to the Church: So His Majesty does not take upon Himself the dispensing with the Effect of those Sentences.*

I have insert this Objection in the Respondents own Words from their printed Case, that, when your Lordships consider, what the Appellants pray, they may be delivered from by His Majesty's Indemnity, it may have its full Force.

That which the Appellants would be rescued from by His Majesty's Indemnity, is Military Force, Dragooning, Criminal Prosecutions, Fines, Imprisonment, being turn'd out of their Houses, &c. and oblig'd to give Bond or Security, that they shall not exercise the Offices of the Ministry, &c.

Now



Now I take the Sense of the Respondents Objection to be, That tho' the King has the executive Power of the Civil Law; yet the Church has the executive Power of the Ecclesiastical. And that tho His Majesty may dispense with the Execution of the Civil Law; yet he cannot dispense with the Execution of the Ecclesiastical. And the Inference, that seems to be drawn from this strange Doctrine, is yet more strange.

The Argument, put in Form, may run thus, The King cannot pardon the Transgressions committed by the Breach of a Spiritual Law. Therefore the King cannot pardon the Penalty inflicted by the Temporal Law upon such a Transgression.

Or thus, The Execution of the Ecclesiastick Censures, is not in the King; but in the Church. Therefore the King must execute such Ecclesiastical Censures, as he has not the Execution of; and not only so, but must add to them the most cruel and hard hearted Civil Consequences.

The Respondents would take it ill, if I should deny, that a Presbyterian Assembly, or even a Provincial Synod could take off the Sentences of Deprivation against the Appellants. And yet from thence would follow, what is fully as absurd as the former, *viz.* That tho' 'tis certain, the King and Parliament can pardon all, that any Power on Earth can pardon; yet the King and Parliament cannot pardon the Appellants, whom the Provincial Synod of *Aberdeen* can pardon.

I find my self in some Concern even for the Respondents, since so many learn'd Council, so many able Heads and so many wise Managers, who have assisted them in this Matter, could make no better Defence against His Majesty's most Gracious Indemnity, against which they inveigh so much. But they have shown  
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their Ability in giving even a *Colour*, tho' a faint one; to that which has no *Body* to subsist by.

Their Way of Reasoning remembers me of an Argument, us'd by some People, to the same Purpose long ago, *viz.* That seeing the Sentences of Deposition and Excommunication pronounced by the General Assembly 1638, against the Archbishops and Bishops for taking Episcopal Consecration, was an Ecclesiastical Sentence, which had a Spiritual Effect. Therefore the King was bound to have forfeit those Bishops of their Livings, and to have confirm'd the Sentences, annulling their Ecclesiastical Orders, by not suffering them to execute the same.

I would indulge the Respondents in any Thing, that would not do a Mischief either to themselves or others; and therefore would have excus'd them, if they had only pronounced Sentences, and rested there. As the Pope does for Fashion-sake, when he accuses and excommunicates the King of *Spain* upon *Maundy-Thurs'day* every Year, for detaining Part of *St. Peter's* Patrimony; but absolves him on *Good-Friday*, without Satisfaction. In which he is more reasonable than the Pursuers. For neither King nor Parliament, nor no other Power under Heaven can atone to them, nor so much as take off the legal Effect of their Sentences. For that's the only Question at present betwixt us. And if the King can but take away the *brachium seculare* from enforcing the Execution of those Spiritual Censures, as they call them, they'll never hurt the Appellants.

But the Respondents will take no Notice of this Point. 'Tis a Thistle they mumble over; and they touch the other but very tenderly. By the Spiritual Effect, they still mean Criminal Prosecutions, legal Incapacities

capacities and delivering up of the Appellants Manfes, Glebes, &c. to them.

*Object.* But the Respondents say, Sacred Orders being once taken away by a Sentence of Deposition, those Orders cannot be restored, but by the Spiritual Power. For the same Power that gives them, must restore them.

*Ans.* By the aforesaid Act 129. Parl. 8. Ja. VI. His Majesty's Royal Prerogative of Supremacy over all Estates, as well Ecclesiastical as Civil, being so well establish'd, it cannot be denied, but that His Majesty may, by Virtue of this Act, not only review, but stop all Proceedings before the Ecclesiastical Judicatories, until he be fully inform'd; and that he may appoint Commissioners to enquire into the Justice and Legality of their Actings, by which none can be prejudg'd, but such as are resolv'd to oppress. This, as that very Learn'd Lawyer, Sir George Mackenzie in a Memorial presented by the Scots Clergy to the King in 1691, well observed, would make Men in the Government cautious; and others who live under it hope for Justice and behave themselves as good Subjects, in that Expectation. Whereas now, the one Side are become Tyrants; and the other, desperate.

2. The learned Lord Chief Justice King observes in one of his Speeches at the Trial of Dr. Sacheverell That the King has, by Law, a supreme controuling Power, which he exercises according to the Rules of Law by His Officers and Ministers of Justice, even over the Sentences, Censures and Excommunications of the Church. For the Exercise of the Church Censures, Jurisdiction and Power must be according to Law. And if any Person be excommunicated against Law, His Majesty's Courts may and will command the Ecclesiastical

Judge



Judge to assoil such excommunicated Person, and restore him to the Communion of the Church again. And tho' there be a great Difference betwixt conferring Orders and restoring Orders unduly taken away; *Nam depositum non reordinabitur, sed reddetis ei suos gradus per instrumenta, & per vestimenta, quæ ad ipsos gradus pertinent*, Ziegler. *de episcop*, cap. 34. Yet I shall thus far join Issue with the Respondents for once, and acknowledge, that 'tis only those, who can give Sacred Orders to Episcopal Ministers, that can take them away; but deny, that any Presbyterian, Quaker, or Anabaptist, or any other Sect, can either give Orders, or take them away from any true Reform'd, Orthodox, Episcopal Minister.

The Respondents may see, by the Admission of so many Episcopal Ministers into Benefices in *England* and *Ireland*, when it was well known, that they had been depos'd by the Presbyterian Judicatures here, what Regard those of that Communion have to their Sentences; and that they esteem the Sacred Orders of Episcopal Ministers nevertheless valid, because the Presbyterian Ministers pretend to deprive them of them. And can any one Instance be given, wherever a Presbyterian Minister was admitted to any Church or Benefice there without receiving Holy Orders from the Hand of a Bishop, whatever Ordination they might pretend to have had formerly?

If the Scale were turn'd, the Respondents would be unwilling to own, that their Orders could be taken away, but by those of their own Sort. And therefore they ought to consider, that what is now intended against the Appellants may some Time or other be made use of against themselves; for there is nothing permanent in this World. And those Sentences now will  
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make that a Crime, which before was not. It will establish a Precedent without a Law; which may not only prove a Snare to themselves, but to Posterity. He, who introduced the *Maiden*, experimented it himself. *Phalaris* was burnt in his own *Bull*: And *Perillus*, who invented it to torment others, was the first that suffer'd by it. And may not their Judges then say to them, as our Saviour said on the like Occasion, *Thou cruel Servant, I will condemn thee out of thy own Mouth*. For, if neither Acts of Indulgence, Acts of Parliament, Acts of Toleration, nor Acts of Indemnity can secure a Man, what Security can we have in any Thing we enjoy? I hope therefore, your Lordships in Place of punishing such as may be Transgressors, will not injure those who are innocent.

Before I leave this Point, I shall offer one Instance, which, I hope, may be of Weight with the Respondents, to show what Regard they have had to Acts of Parliament, in restoring Ministers of their own Communion depos'd, nay even excommunicated by themselves (tho' I think that Matter was carry'd too far) and that is when the Act of Parliament settling Presbyterian Government at the Revolution, appointed the Government of the Church to be in the Hands of those Presbyterian Ministers, who had been outed since *January 1661*. When those Ministers met in *1690*, they thought that Act gave all of them so good a Right to sit in that Judicature, that tho' two of their Number had been depos'd, if not excommunicated by the Presbyterians themselves; One as is reported for a very unnatural Uncleanness; and Mr. *Kennedy*, who was then chosen Moderator of their first Meeting, lying under their Sentence of Excommunication and Deposition. Yet that was found no Objection against their being

being admitted to that Reverend Assembly, and even against Mr. *Kennedy's* having the Honour of being their Preses; tho' he had the Misfortune to live and dy under that Sentence. I'm far from approving such a Proceeding: But it is an Argument *ad hominem* against the Respondents. For nothing but that Act of Parliament (which indeed I think was extended too far) could intitle them to of be their Number in that Assembly, or to serve in the Ministry thereafter. Seeing then the Respondents admitted an Act of Parliament to take off Sentences of Excommunication against those of their own Communion for Ecclesiastical Crimes: With what Countenance can they refuse to admit an Act of Parliament now to take off the Sentences of Deposition pronounc'd against Episcopal Ministers, even in Absence, for a Misdemeanour committed only against the State?

One other Instance, wherein the Opinion of the Civil Judicatures concurred with that of the Church, I hope, will put this Matter beyond Dispute. And that we have in the Case of Mr. *Arthur Mitchel*, Minister at *Turreff*, who being depos'd by the General Assembly before the Restoration, and Mr. *Alexander Leask* legally settled Minister in that Church for many Years: Yet both the General Assembly and Privy Council of *Scotland* preferred Mr. *Mitchel* upon the Act of Parliament 1690, restoring Presbyterian Ministers, without Regard to his being under the Sentence of Deposition.

It were easy further to expose the Absurdity of the Respondents Notion of limiting His Majesty's Prerogative to the executive Part of the Civil Law (were it for the Appellants Purpose) for which they might be liable to an Action of *Premunire*. But if it be granted, that His Majesty has not exceeded his Royal Power in



taking off the Civil Effect ( tho' the Act does not restrict it to that ) and legal Penalties that may be inferr'd from Ecclesiastical Sentences, and Contempts in Ecclesiastical Courts in such Matters as were commenced for Correction, it is sufficient in the present Case. Yet for Truth's Sake I must observe, that whatever a certain Sort of People may mutter against His Majesty's Supremacy in private ; yet 'tis amazing, that any of the King's Lawyers should offer any Argument, that has the least Insinuation that Way, for they certainly do and ought to know better. But I perswade my self, it had been put into their Case to please their Clients: For as the Assertion is against Law ; so such Principles are dangerous to the Constitution.

The Supremacy, even in Cases Ecclesiastical, seems to have been ever the proper Right of Secular Princes ; as appears from the first Book of *Justinian's Codex*. In which among other Things he orders, *Vim legum obtinere Ecclesiasticos canones, a quatuor Synodis Nicœna, Constantinopolitana prima, Ephesina prima & Chalcedonenſi expoſitos & confirmatos*. And there is no Reason, why Christian Princes should not enjoy that Privilege, which Princes were in Possession of before Christianity. For, by their turning Christians, they did not lose their temporal Jurisdiction ; nor, by becoming Protectors of the Church, did they give up their Sovereignty over the Pople.

*Constantine the Great*, and first Christian Emperor, is approved by all the Fathers for settling the just Marches betwixt the Ecclesiastical Civil Jurisdiction. *Euesb. lib. de vit. Constant Vos quidem των ενσω της εκκλησιας eorum quæ intus in Ecclesia sunt agenda ; ego vero των εξω quæ extra sunt Episcopus sum a Deo constitutus.*

If the Respondents want more Authorities to this Purpose, let them consult their Friend *John Knox* his Appeal,

Appeal, from the Sentence pronounced against him by the Bishops and Clergy in *Scotland*, to the States, Nobility, &c. there. Wherein he asserts and proves, That Princes, as God's Lieutenants, are obliged to defend their Subjects against the blind Rage and Tyranny of Priests, notwithstanding that they claim to themselves Authority to judge all Matters of Religion: And proves the same from the Instances of the Prophet *Jeremiah* and *St. Paul*.

For tho' *Jeremiah* the Prophet of God, was condemn'd by those, who were then known to be the only visible Church on Earth, to wit, the Priests and Prophets, who were in *Jerusalem*, the Successors of *Aaron*, to whom Charge was given to speak to the People in the Name of God, and a Command to the People to hear the Law from their Mouths, to the which if any were rebellious or disobedient, he should die the Death: And tho' the Prophet was condemn'd by Men thus authoriz'd by God; yet it appears he had Right to appeal, that is, seek Help from the Secular Princes, whose Power was above the others Tyranny; for he lays his Blood to their Charge, yea even to the whole City, as well as to the Door of his Enemies, if they did not protect him.

And tho' the Apostle *Paul* was accused in Matters concerning Religion, viz. as an Apostate from the Law, a Violator of the Temple, and a Transgressor of the Tradition of the Fathers, before *Festus*, who would have judged of the Matter at *Jerusalem*, where the Learned of the Apostle's own Nation might have heard his Cause, and determin'd therein: Yet the Apostle made Use of his Privilege, in appealing to *Cesar*, who tho' ignorant of GOD, and an Enemy to Virtue, yet the Apostle considering the Nature of his Enemies, and what

what Things they had intended against him; from the first Time he began to preach the Name of *Christ*, would by no Means admit them as Judges or Auditors of his Cause, as *Festus* required, thinking it unreasonable, that he should be put in the Hands of his Enemies; but rather very rightly made his Appeal, from them and from the Judges that would have gratified them, even unto *Cesar*.

From whence it is evident, That it is lawful for the Servants of God, oppressed by unjust Sentences, to seek Remedy against the same, be it by Appellation against their Sentence, or by imploring the Aid of the Civil Magistrate, which he is bound in Conscience to vouchsafe. For what God approv'd in *Jeremiah* and *St. Paul*, he cannot condemn in Others.

The King, by our Law, is *Persona Sacra mixta cum Sacerdote*, the Chief Ecclesiastick as well as Laick within his Dominions; and is, by a solemn Consecration and Uction, made a Spiritual and Ecclesiastical Person. And as he has, at his Coronation, the *Corona Regni* put upon him, as an Emblem of his Temporal Power: So has he likewise *Stola Sacerdotis*, commonly called *Vestis Dalmatica*, put upon him as a Levitical Ephod, to signify his Power in Spirituals.

His Majesty is, by the standing Laws unrepeal'd, declar'd to be the Supreme Governor and Judge in all Causes, as well Ecclesiastical as Civil, *Ja. VI. Par. 8. Cap. 129 and 130.* which is ratified and confirmed, *Ja. VI. Par. 18. Cap. 1.* and by *Cap. 4, and 15. Par. 1. Cha. II.* as has been taken Notice of; and 'tis observable, that His late Majesty *K. William* was so careful of his Prerogative after the Revolution, that he gave express Order to his Commissioner not to give his Royal Assent to any Law in Prejudice of the aforesaid Acts, I have only mention'd these Acts, because there can be



no Pretence of their being repeal'd. And I might add some Others, particularly Act II. Par. I. Cha. II. which appoints all Persons in Publick Trust, Civil or Ecclesiastical to take an Oath, by which they acknowledge His Majesty to be Sovereign and Supreme Lord in all Causes whatsoever.

It is true, the Obligation of taking any Oaths, except such as are impos'd in the present Reign, is taken away. Yet I beg Pardon to say, That the Proposition remains as true, as ever. For which, I have the Authority of the Lord *Harcourt*, late Lord Chancellor of *Great-Britain*, as great a Person as ever fill'd or adorn'd that High Station, who, in a Speech to the House of Lords, upon a very solemn Occasion, expresses himself in this Manner, *I beseech your Lordships to consider, Whether the Repeal of this Oath can have any Weight with your Lordships. 'Twas a general Assertion, to which all the Peers and Commoners, in the Employments I have mentioned, were to swear; there is no Exception in the Oath, but what is implied in it. Was not the Proposition as true before it was sworn as after? Was it therefore true, because 'twas sworn; or was it sworn because 'twas true? Did the swearing it make it true, or the Truth make it fit to be sworn? If it was true when it was sworn; the Proposition is equally true before and since. I believe, since the Oath was taken by so many Peers and Commoners, no Man will pretend to question the Truth of the Proposition.*

To conclude this Point, if either King, or Parliament, or both, or consequently any Power on Earth, could indemnify the Appellants from what is laid to their Charge, whether it be a Crime or a Trespass, a Misdemeanor or a Transgression, a Contempt or Offence (for without one of those they could not forfeit their Offices)

Offices) or if they could at least pardon the Appellants from the Pains, Penalties, Forfeitures, and Incapacities incurred thereby: They have done it effectually, and there is no Exception in the Act that reaches their Case. And for the spiritual Effect, *Qui Deum tantum habet ultorem*, the Appellants shall never apply to the Respondents for their Pardon.

Were it necessary, I might add several other Reasons for founding this Appeal, and particularly; *First*, That the Lords of Justiciary had order'd the Appellants to cede the Possession of their Churches, and to deliver up their Manfes, Glebes, &c. under particular Penalties which could only be enjoin'd by the Legislator. *Secondly*, The Encroachments and Invasions made upon the Rights of the Subjects, contrary to the known Laws in the Appellant's Case. For Instance, the cruel and arbitrary Way of executing the Presbyteries Sentences, and turning the Appellants out of their Houses and Livings, short Hand, by Military Force; by Warrants from Lieutenants of Counties (whose Office has been scarce heard of in this Place for some Hundreds of Years past) by Orders from commanding Officers of the Forces quarter'd in the Country, and the like; tho'tis certain, the Church can pretend to no Jurisdiction but Spiritual. And I defy any Man to show any Law, by which the Appellants could forfeit their Benefices by the Sentence of any Church Judicature now in Being. For even the 22d Act, Par. 1693 (and which was since repeal'd) made only their Sentences against such, who did not, at that Time, sign the *Confession of Faith*, and submit to the Presbyterian Government to infer Deprivation, *tam ab officio quam a beneficio*. And the Appellants might put their Cause upon this Issue.

But

But those and other Matters will be more fully represented to your Lordships, when the Cause comes to be heard at the Bar of the House. In the mean Time, as the Issue of this Appeal is of the greatest Importance, not only to the Appellants, but to all those of the Episcopal Communion, they all in one Voice thus humbly presume to lay their Case before your Lordships, who are, under GOD and His most Sacred Majesty, the Guardians of our Laws, the Protectors of our Liberties, the Supporters of our Constitution, and the Pillars of our Church, to whom those Sacred and important Trusts are peculiarly committed, and to whose Patronage they have a Claim preferable to any other Consideration whatsoever, humbly beseeching your Lordships to interpose your great Power and Influence for reversing the foresaid Judgment: So as the true Orthodox Christians in this Place may not be deprived of the Worship, frustrated of the Sacraments, secluded from the Ordinances, and bar'd from the Benefit of Publick Prayer and Devotion; by which, in Place of Piety and Religion, we shall have an Influx of Error, Heresy, and Atheism. From which we pray, That GOD in His Infinite Mercy may deliver us.

In Respect of all which, and that it appears, That this Process was neither competent with Respect to the *Actor*, to the *Reus*, to the *Judex*, to the *Causa* itself, or to the *Effectus* thereof: But labour'd under all the Defects and Informalities that any Prosecution ever did. Seeing, 1. With Respect to the *Actores* or Pursuers, they were absolutely incapable to hold any Plea, or to prosecute any such Action against the Appellants, all of them being, *ipso facto*, depriv'd for not taking the Oaths. 2. With Respect to the *Rei* or Defendants, now Appellants, they were not subject to the Preby-



terian Judicatures; especially to those who were never author sed by any Law. 3. With Respect to the Judges, they were not only incompetent by Reason of the Nature of the Crime, the Appellant's Exemption from their Jurisdiction, and that they are otherwise inhabile as Parties; but for that most of them stood likewise depriv'd by express Act of Parliament for the Reason aforesaid. 4. With Respect to the Cause, tho' both the *Actores*, the *Rei* and the *Judices* had been habile; yet the first Proceedings were illegal, and in the last there was nothing produc'd, nothing shown, that could be the Foundation of a Criminal Prosecution the Attestation of a Presbytery-Clerk without other Proof being utterly insufficient and no better than an extraneous Missive Letter. 5. With Respect to the Effect, tho' all had been regularly and legally carry'd on, the same was taken away by His Majesty's most gracious Indemnity. And therefore seeing the Appellants have qualify'd themselves to the Government by taking the Oaths, and praying for His Majesty in express Terms, as the Law directs: It is humbly hop'd, the said Judgment shall be reversed, the Fines pay'd back, and the Appellants restored to their respective Rights, and to the quiet Possession of their Offices with such reasonable Costs, as to your Lordships great Wisdom shall seem meet.

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*Follows*

*Follows the MEMORIAL or CASE of Mr. George White, Minister of the Gospel at Maryculter, humbly offer'd to the Consideration of the Provincial Synod of Aberdeen, and thereafter to the Lords of Justiciary, in Behalf of himself and Others.*

**M**R. George White, Minister of the Gospel at Maryculter, being summoned to compare before the Presbytery of Aberdeen, upon the Thirteenth Day of June 1716, to answer to a Libel or Indictment, at the Prebytery's instance, against him, reciting, That he had been guilty of Treason and Treasonable Practices against the Government; and that he had Accession to the late Rebellion, by praying for the Pretender, under the Name of King James VIII. and had observed Fasts and Thanksgivings for his Success; and had joined in the Rebellion, and set up a Popish Successor or Pretender, in Opposition to our Legal and Rightful Sovereign; and that he had neglected to pray for His Majesty King George, as the Law directs

To this Libel Mr. White gave in his Defences and Declinators founded upon several Laws and Acts of Parliament. Notwithstanding whereof the Presbytery,

upon the Fourth Day of *April* last, in a very summat and arbitrary Manner, pronounced Sentence of Deposition against Mr. *White*; whereof he now complains, and craves the same may be reversed, as illegal and unwarrantable, which he humbly hopes to prove to the Satisfaction of all good Men.

In order to which he shall endeavour to prove the following Points.

- I. That the alledged Crime of Treason and Treasonable Practices is only cognoscible by the Temporal Judicatures; and that the Ecclesiastical are not competent Judges thereof, even under Pretence of Scandal.
- II. That Mr. *White* is not subject to their Jurisdiction, not being of their Communion, but exempted by express Acts of Parliament.
- III. That suppose the Church were Judges of the Crimes libelled, and the Defender were of their Communion, owned their Mission, and were subject to their Laws; yet he could not have been deprived by the Presbytry, nor by any Ecclesiastical Judicature under a Provincial Synod, who could not delegate their Power to a Presbytery.
- IV. That suppose the Presbytery had been competent Judges, and that the Synod or other Judicatures could delegate their Authority to them; yet their Proceedings were illegal and unwarrantable, being upon an alledged Crime, which was prescribed by express Acts of Parliament, and the Sentence without any legal Probation, upon single Testimonies without concurring Proof as to the Time and Circumstance; pronounced *a non suo Iudice*, and



and *extra Territorium*, by Persons *ipso facto* deposed by Act of Parliament, for not taking the Oaths, and grossly iniquous in itself.

V. Suppose Mr. *White* had been guilty of the Crimes libelled, and that the same had not been prescribed by Act of Parliament; yet the same is indemnified by His Majesty's Gracious Act of General Pardon.

For clearing of this Matter, the following Propositions are laid down, which 'tis hoped the Reverend Synod will not deny; and which Mr. *White* is ready to prove, if they be controverted.

1. That the Government of this Kingdom, both Ecclesiastical and Civil, is happily and harmoniously united under one Sovereign Head: And, by the standing Laws of the Land nowise repealed: the King, as He is the Fountain of all Power, so He is Supreme over all Estates and Persons, both Spiritual and Temporal, *Ja. VI. Par. 8. Act 129.* And all the Jurisdictions and Judgments, Spiritual as well as Temporal, that are not warranted by the Acts of Parliament, are declared unlawful; and both the Usurpers of such Jurisdiction, and the Obeyers thereof are punishable as Contemners of His Majesty's Authority, &c. *Ja. VI. Par. 8. Cap. 131.*

2. That as no Judicature, Convention or Assembly can meet or determine in any Matter Civil or Ecclesiastical, but by the Authority of Parliament; so the Law is the Standard and Measure of their Decision and Judgment. And all Proceedings beyond the Limits of this Law, are, by Colour of an usurped Authority, no less than Oppressions against Law, and punishable as such.

3. That

3. That as the Law is the Measure and Bounds of every Subject's Duty and Obedience; and every Man has a fixed Fundamental Right born with him, both as to the Freedom of his Person and Property, which he cannot be deprived of, but either by his Consent, or some Crime for which the Law has imposed such a Penalty or Forfeiture; and as this Law was never the Dictates of any Conqueror's Sword, far less the Caprice of any Arbitrary Judicature, but that which is agreed to by our Kings, with the general Approbation of the Representatives of the Nation: So to be judged by this Law, and this only is the greatest Inheritance and paramount Privilege that every Man in this Island is born to; and to deprive them thereof is consequently the greatest Injury.

4. That all Crimes, by which we may forfeit Life, Fortune or Freehold, which we enjoy for Life, the Law has not only stated such Punishment, but appointed the Judges, before whom and in what Manner such Crimes are to be tried. So the Causes and Manner of Deprivation of Ministers of their Offices, which is their Freehold, are expressly set down in the 132 Act, Par. 8, *Ja. VI.* distinguishing which of those Crimes or Causes of Forfeiture are to be tried before the Temporal, and which before the Ecclesiastical Judicatures.

Those Principles being admitted, Mr. *White* may with very good Reason conclude, That the *First Point* he undertook to prove, does naturally follow from thence, *viz.* That as there is no Law or Statute, that impowers the Church to cognosce in Matter of Treason; so, by the known Laws of the Land, all Treason and Treasonable Practices, &c. and the other Crimes called *Pleas of the Crown,*

*Crown*, are only cognoscible by the Supreme Criminal-Court, and by no other Judicature whatsoever, Ecclesiastical or Civil.

And this is so plain a Proposition, that 'tis hoped none will adventure to deny it. And of what Consequence it would be to allow Church-Judicatures to sustain Relevancy, admit Probation, or so much as to meddle in such Matters, fatal Experience has too clearly demonstrate to this Nation.

As those Propositions do not bar or hinder Ecclesiastical Judicatures from exercising that Jurisdiction which is committed to them by the Laws of the Land; so neither do they in the least interfere with the several Powers and Faculties that Church-men have by their Ecclesiastical Order, which they derive from *Jesus Christ*, such as the Preaching of the Word, the Administration of the Sacraments, &c. and conferring the like Power on others. Yet as to the temporal Jurisdiction, and the external Government of the Church, it is both in the Exercise and the Substance thereof, intirely derived from the Laws of the Land; and those declare, that the Church has no other Punishment in her Hands but Spiritual, *Ja. VI. Per. 13. Cap. 2.* And if even the Church of *England*, the greatest Protestant Church on Earth, and the chief Bulwark against Atheism and Popery, should offer to proceed even to Censure or Excommunication contrary to those, there lies a Prohibition from the Temporal Courts in *Westminster-hall*; as no Doubt there is a Remedy from the Supreme Courts here, against such illegal Encroachments of Presbyteries, and other Church Judicatures.

As the intrinsick Power of the Church in those Matters, which concern the Office and Function of a Minister,



ster, such as Preaching, Baptizing, Binding and Loosing,  
 &c. do not interfere with the State, if it be not stretched  
 beyond the due Bounds: So the Law and Acts of Par-  
 liament both declare and give Jurisdiction to the Kirk,  
 which is declared to consist in the Preaching the Word,  
 Correction of Manners, and Administration of Sacra-  
 ments, *Ja* VI. Par. 6. Cap. 69. And by the 132 Act,  
 Par. 8. *Ja* VI. aforesaid, the Ecclesiastical Judicatures  
 have Power, upon lawful Proof, Trial and Conviction,  
 to deprive Ministers under their Jurisdiction for parti-  
 cular Crimes, such as false and erroneous Doctrine,  
 Blasphemy, Heresy, Fornication, Drunkenness, Simony,  
 and the like: But, under Pretence of that, to judge  
 other Crimes, particularly of Perjury, which by the  
 aforesaid Act is expressly committed to the Supreme  
 Criminal Court, much more of Treason and treasonable  
 Practices, and, even under Pretence of Scandal, to  
 determine, in a judicative Capacity, the Limits and  
 Bounds betwixt King and Subject, as they did in 1648,  
 when they made Acts of Assembly against Acts of Par-  
 liament, pronounced Anathema's, and ordered Excom-  
 munications against such as were by Order of Parliament  
 engaged in a War, for restoring His Majesty King *Charles*  
 the blessed Martyr; and obliged Noblemen, Gentle-  
 men, &c. to do Penance in Sackcloth, for engaging in  
 that glorious Enterprize, so much approved of by suc-  
 ceeding Parliaments; I say, under Pretence of the Scandal  
 accessory to such Treason and treasonable Practices, to  
 forfeit Men of their Livings, and Reputation which is  
 dearer to them than Life, is what 'tis hop'd the Church  
 will not pretend to. For, *Qui est Judex in principali*  
*est Judex in accessorio*; and under such Pretex-  
 ts they might judge all Transgressions against any positive Law:  
 For the Breach of the Law is a Disobedience and  
 Contempt

Contempt of lawful Authority, which is the Breach of a moral Duty; and so may be said to come under Scandal, as all Sins come under the first or second Table of the Law. And tho' the Duty betwixt King and Subject, Parents and Children, Husband and Wife, Master and Servant, and the like, are the Subject of Ministerial Doctrine, as contained in, and to be taught and cleared from the Word of GOD: Yet to pretend, that they are therefore a Subject of Cognizance and Judgment for the Kirk, 'tis what is hoped, will not be alledged. For indeed nothing of this Nature comes under their Cognizance, even as to their own Members; but such Scandals as are against the positive Moral Law, which, at all Times, and upon all Occasions, *semper & ad semper*, are unlawful, and not consequential Scandals arising from the Transgression of a Law purely humane, which may be and often is altered and changed according to the Circumstances of the Common-Wealth; and sometimes that, which formerly was a Duty, becomes a Transgression, & *e contra*. And to suffer the Church to be Judges in such Matters, were to set up *regnum in regno*, and the Church against the State. For, as in the present Case, if the Church had Power to judge and to find the praying for the Pretender a Crime, which no Doubt it was, they might have found it a Duty: For it is not the first Time they have mistaken that Matter, as in the Instance before mentioned. And the Inconveniencies of suffering the Church to meddle in such Matters by joining Issue, receiving Proof, or anticipating the Judgment of the Temporal Courts, are obvious to the meanest Capacity. For tho' those Things, when proved, may come under some Sort of Duty or Sin; yet the Facts, inferring such Disobedience, are not cognoscible by the Spiritual Courts, but have their Effects

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and Penalties from the positive Law of the Land applied by the ordinary Judicatures.

As to the *Second Point*, viz. That Mr. *White* is not subject to the Presbytery's Jurisdiction, appears to be evident.

1. In respect that Mr. *White* neither is, nor ever was of their Communion; and his Principle leads him to differ from them in most essential Points, both in Relation to their Mission, Ordination and Jurisdiction, their Schism from the true Reformed Church, and refusing to comply with that Uniformity of Worship prescribed by her.

And therefore, as no Law obligeth him to comply with the Acts and Ordinances of the Presbyterian Kirk, so it were against Reason, that he should be judged by those Acts and Rules which he is not bound to obey, and which they, in Conscience, are bound to judge by.

For, suppose Episcopal Ministers do own the Doctrine of the Church of *England*, and their Liturgy, which is very unjustly condemned by the Acts of the General Assembly, as containing many Popish Errors and Ceremonies, and as the Seed of manifold and gross Superstitions and Idolatry: Can the Presbyterian Church, upon the Pretext of Scandal, judge Episcopal Ministers upon such Grounds of Heresy, Idolatry, &c.? Or, if they should, would their Sentences, or greatest Censure have any other Effect than the *brutum fulmen*, or Excommunication, pronounced by the Pope of Rome regularly every Year, against all Protestants.

And whereas it is pretended, That by the 5th Act of Parliament 1690, the Government of the Church is put into the Hands of Presbyterian Ministers, and the



have Power to purge out all those who were insufficient, negligent, scandalous and erroneous, by due Course of Ecclesiastical Process: And by the 22d Act of the Parliament 1693, such Ministers as are scandalous, erroneous, negligent, or insufficient, are declared to be liable and subject to the Power and Censure of the Church, as accords. And by the 22d Act 1695 concerning Intruders, It is Declared, *That they who are deposed cannot Preach or Exercise any Part of the Ministerial Function, without a high Contempt of the Authority of the Church, and of the Laws establishing the same.*

It is Answered, That by the forecited Act 1690, the Government of the Church is put in the Hands of such Presbyterian Ministers as were outed since the first of January 1661, and such Ministers and Elders as they had admitted and received, or should admit or receive; yet there is no Power granted to any to try and purge out as aforesaid, but to the first General Meeting (which is to be upon the Third Tuesday of October thereafter) or those appointed Visitors by them. So that there being now an End to that Visitation, that Power is terminate. And as to the Act 1693, 'tis true indeed, that Act ordains all Ministers to be subject to the Presbyterian Church Government, and to sign their *Confession of Faith*, and join in their Worship, and for that End to apply to the General Assembly or other Church-Judicatures; and appoints the Civil Magistrate to give their Concurrence, to make the Censures and Sentences of the Church effectual. But that Act did give no Power absolutely, but over those who submitted to the Presbyterian Government, and over others only, as accords; for as to those, if they had no Power formerly, this Act gave them none. But whatever was the Import of the forecited Act 1693, and of

the 22d Act 1695, which could only relate to Sentences *de Jure* then pronounced, when they had Jurisdiction over Episcopal Ministers as well as Others, and not to those who were exempted thereafter from their Jurisdiction, for the same was rescinded by the 27th Act of the Parliament 1695, which was posterior to both, whereby it is declared, That all the Episcopal Ministers that had continued in their Churches since His Majesty's Accession to the Throne, and should qualify themselves by taking the Oath of Allegiance and Assurance, and should behave themselves worthily in Doctrine, Life and Conversation, as becomes Ministers of the Gospel, should have, and enjoy His Majesty's Protection as to their Kirks, Benefices, and Stipends, any Thing contained in the Act 1693 notwithstanding. And there is thenceforth no Obligation upon any Episcopal Minister to apply to their Judicatories, sign their *Confession of Faith*, acknowledge their Government, or to submit to their Discipline. And this is further clear from the Acts of Parliament made in *Anno* 1700, 1702, and 1703, where, tho' the Presbyterian Government and Discipline is ratified, it is with an express Reservation of the 27th Act, Parliament 1695, and of the Protection and Allowance given to the Episcopal Clergy. But to put this Matter beyond Dispute, the Parliament 1712 (for remedying an Abuse then complain'd of, of Magistrates imprisoning and forcing Persons conven'd for Church-Scandals to compear when the Law had taken off the Civil Effect of their Church Censures at the Revolution) by an Act, *Anno Decimo Regine*, Intituled, *An Act to prevent the Disturbing those of the Episcopal Communion, &c.* It is Declared, That no Civil Pain, Forfeiture, or Disability whatsoever, shall be any wise incurred by Reason of any Excommunication,

*ation, or Prosecution, in order to Excommunication, by the Church-Judicatories in Scotland. And all Magistrates are expressly prohibited and discharged to force any Person to appear when Summoned, or to give Obedience to any such Sentence when pronounced; any Law or Custom to the contrary notwithstanding. So that as those of the Episcopal Communion do not in Conscience think themselves subject to the Presbyterian Censures, even the greatest, which is Excommunication, and that no Man can forfeit so much as one Groat, by Reason of such Sentence: So it is left to all impartial Men to judge; In the First Place, If there is not again a fair Repeal of the Act 1693, and of all other Acts which order the Civil Magistrate to give their Concurrence for making the Sentences or Censures of the Church effectual. And in the Next Place, Whether or not, seeing the Law has freed every Subject from all Civil Pain, Forfeiture or Disability whatsoever, that can be incurred by Reason of the greatest Sentence or Censure which the Church can inflict, has nevertheless left in the Church's Power to disable and forfeit an Episcopal Minister upon a lesser Sentence; or, in other Words, has given them Power by a lesser Censure to forfeit a Man for an Offence which their greatest Censure could not have done, and which, they themselves have not thought, did deserve their greatest Punishment.*

Nor are therefore any Crimes or Offences to go unpunished. For as all Men are subject to that Church which they think to be of Divine Authority in Matters relating to their Conscience: So the Laws of the Land are deficient in no Case, either as to the Statutory or Executive Part, whether it be in Relation to the Punishment of Transgressions against Divine, Moral

or



or Municipal Laws; and the Presbyteries are ordained to appoint Informers and Prosecutors of such Offences before the ordinary Judicatures, Act 40. Par. 1693. And, by Act 13. Par 1695. Judges are ordained, under severe Penalties, upon any Prosecution of such Scandal and Immoralities by Ministers or Kirk-Sessions, to proceed and determine without Neglect or Delay. And by Act 31. Par. 1696, which was the first Parliament after Episcopal Ministers were freed from the Presbytery's Jurisdiction, all Judges and Magistrates are respectively bound to take Trial of such Scandals where they themselves resided, and to appoint such Deputies, as should be named by the Kirk Session, &c. in such Parishes wherein they did not reside, strictly to judge of such Offences. And it is therein Declared, *That no Pretence of Difference of Persuasion in Matters of Religion, should exeem the Delinquent from being censured and punished for such Scandals and Immoralities.* So that the whole Frame of the Laws seems to settle the Punishment of Scandal and Profaneness in the Civil Magistrate.

And it is observable, That by the First Act of the Regulations of the Commissaries, *Anno 1666*, they are expressly appointed to judge in Cases of Scandal. And those Courts, which are *Curie Christianitatis*, being still continued in every Diocess of Scotland, notwithstanding of the Presbyterian Government; there was no Shadow of Pretext for Presbyteries to usurp a Jurisdiction which was committed to Others. For they, yea even Bishops, properly speaking have but *Audientiam non Jurisdictionem*: And therefore by Colour thereof to exerce a Jurisdiction not bounded by Law, is no less than Oppression against Law. And for them to forfeit, disable and incapacitate His Majesty's Subjects

Subjects by their own Authority, tends manifestly to render useless all Parliaments, and to subvert and alter the very Frame of our Constitution.

I shall conclude this Point with an Authority, which, I hope, will be binding upon the Presbyterian Church, viz. the Opinion of the General Assembly, *August 2d 1648*, where, in a Letter to the Assembly of Divines in *England*, they recommended to them, *That they would gravely warn their Dissenting Brethren, what a Door they kept open for Errors and Heresies, by their Tenet of Independency; whereby they leave no Means of Authoritative Ecclesiastick Suppression of Error, if any Independent Congregation will please to own them.* Now I would gladly know, what authoritative Ecclesiastick Power has the Presbyterian Church over the true Reform'd Protestant Episcopal Church, who look upon them to be Schismatics, and neither own their Mission, nor agree with their Principles. For the Church therefore to pretend to proceed upon a Libel of Treason and Treasonable Practices, (which is only competent to the State) when they have not the least Jurisdiction over the Episcopal Clergy, even in Matters relating to the Church, as is evident from the former Instances, which they look upon as heretical, superstitious and idolatrous, is against all Reason and common Sense.

As to the *Third Point*, viz. That suppose *Mr. White* had been of the Presbyterian Communion, and had applied, and been assum'd into their Judicatures, which is not pretended; yet he could not be depriv'd otherwise than by the Laws of the Land.

The Church must not determine, what and how it will, because it will. No. In all Things it has Relation

onto, even to Spirituals, it has its bounds and Rules to go by, a constant Law, and that *non Factam sed natam*, not what the Church makes, but what it finds, much more when such Sentences have an Influence on Civil Right. And so it is, that as there is no Law, nor Act of Parliament, declaring any Crime, pretended to be prov'd against Mr. *White*, to be a Ground of Forfeiture of his Liferent-Office. For ' notwithstanding of the atrocious Crimes charged against him with all the Calumny and exaggerating Circumstances, Language could express ) all that is pretended to be contain'd in the Depositions taken against him, ( which were elicited by Force and Compulsion both by the Civil and Military Power, as shall be taken notice of afterwards ) being, that sometime, during the late Rebellion, when the Country was furrounded with an Army, and no visible Protection at that Time from the Government, that he, an old Man, now of 80 Years of Age, under great Fears and Apprehensions, made some Sort of Compliance, by praying for the Pretender. For, tho' the Words, King JAMES are said to have been mentioned, yet not as King of this Realm : And the Witnesses declared at the same Time, that he had prayed for his Majesty King *George* in Express Terms; and whether the Presbytery omitted to mark that Circumstance or not, Mr. *White* doth not know. But the same was distinctly and audibly repeated by the Witnesses, and an Instrument of Protestation taken thereon in the Hands of *John Anderson* Notar Publick; the Verity of which is further offer'd to be prov'd by all the Members of the Synod, who were present at the Examinations. And tho' this, which if it had been true, was a very great Fault, yet not such as was a sufficient Ground in Law to forfeit him of his Office for Life. For all Punishments where the Law declares



declares not the same to be Forfeiture, ought still to be *Salvo contentemento*, as the *Magna Charta* well expresses it. And as no Forfeiture can be but by Statute; so none can grow even by Letters patent, or any Man be put from his Lively hood, but by an express Law.

Mr. *White* is not absolutely to contend his Innocence; For, in strict Law, it would be in vain for the Loyalest Subjects, who liv'd in this Part of the Kingdom, during those late Confusions, to defend his Actions by that Rule. Seeing corresponding with Rebels, and acknowledging the Pretender's Authority by paying Taxes and the like, are undeniably Criminal, who amongst us did not share in that Guilt? And we were all forced to be idle Witnesses to those Transgressions. Mr. *White* therefore only humbly presumes, that as His Majesty has been graciously pleased to overlook such Offences in those irregular Times, when Law it self seem'd to be banish'd with the Sovereign Protection; mere Compliance can amount to no Crime which ought to have been punished with such Severity, as the depriving an old Man, who has one Foot in the Grave already, of Bread. For as many of Mr. *White's* Judges are conscious to themselves, that they owe their Security to His Majesty's Clemency, and are thereby screened from those Prosecutions, which in strict Law, might have been brought against them, even for Acts which perhaps they look'd upon to be Acts of Charity and Humanity, as the sheltering and intertaining their distressed Friends, who were involved in those Disorders: So our Royal Master may say to them, as our Saviour said on the like Occasion, Sure I did pardon thee, why wast thou so cruel to thy Fellow-Servants?

2. By Act 114. Par. 12. Ja. VI. ratified by the *Articles of Union*, which is the Basis and Foundation of

the Presbyterian Church-Government, the Power of Presbyteries, Synods and General Assemblies is set down, as they were agreed to by the King and certain Commissioners of the Kirk. By which Act it is evident, that no Presbytery or Kirk-Session has the Power of Deprivation; and that Power is committed to no Judicature under a Provincial Synod, and that only for good and just Causes deserving Deprivation. Neither does the Law leave those to private Mens Opinion, but expressly mentions the Causes of Deprivation, *Ja. VI. Par. 8. Cap. 132.*

And whereas it has been suggested, That the Presbytery had a Power from the Provincial Synod to cognosce in such Matters. If any such Power was granted, it was illegal, and no less than usurping the Legislative Authority. For the Synod could no more delegate their Power to a Presbytery in Matters solely committed to them, than the Lords of Session, or the other Judges in *Westminster-Hall* can give Power to one or more of their Number to keep their Courts, and sit and determine Causes in the Vacance or out of Term-Time.

As to the *Fourth Point*, viz. That suppose the Presbytery had been Judges competent, and Mr. *White* subject to their Jurisdiction; yet their Proceedings were illegal, in so far as,

I. The same was without any sign'd Information from the Parishioners, Elders, Kirk-Session, or any other Person whatsoever, as the Law directs.

II. Tho' the Church of *Mayculter*, whereof he is Minister, is locally situated within the Sherifdom of *Kincardin*, and in the Diocess of *St. Andrews*; yet he was summoned to compear and answer before the Presbytery

bytery of *Aberdeen*. For, tho' the Bishop of *St. Andrews*, during his Time, dispensed with the Church of *Maryculter's* being under the Inspection of the Bishop of *Aberdeen*; yet that could last no longer than his Lifetime, or at further during Episcopacy. And by the express Acts of the General Assembly, *Anno 1638*, (conform to which and not to any Practice or Dispensation of a Bishop, the Synod is bound to judge) all the Presbyteries of the Provincial Synod of *Aberdeen* are in the Sheriffdoms of *Aberdeen* and *Bamff*; and the Presbyteries in the Sheriffdom of *Kincarden* belong to the Provincial Synod of *Angus* and *Mearns*. And therefore the Proceedings of the Presbytery of *Aberdeen* against *Mr. White* were, *a non suo Iudice*, and therefore void in Law.

III. The Presbytery's Procedure was further unlawful, being *extra territorium*. For tho' *Mr. White* was summoned to compear at *Aberdeen*, yet they adjourned their Meeting, and examined the Witnesses at *Banchory-Darvick*, which is in the Sheriffdom of the *Mearns*, and without the Bounds of the Diocess of *Aberdeen*.

IV. The Witnesses, examined against *Mr. White*, at *Nether-Banchory* upon the 20th of *February*, were altroneous; they neither having got a Summons or Citation to compear on that Day, or at that Place, nor in that Year of GOD. It is true, they were summoned to compear at *Aberdeen* upon the Thirteenth Day of *June*, the Year before. But they having refused to compear, even by an Order of the Sheriff of the County of *Kincarden*, before any Judicature in the Shire of *Aberdeen*, and likewise as judging themselves secure by the *Act of Toleration*, and that they could not be compell'd to answer in any Process, which might end to a Sentence of Excommunication, as no Doubt,



the Process against Mr. *White*, (who had refused to subject himself to their Judicatures, and who they lookt upon as contumacious) certainly did, there were several Decrees pronounced against them for their pretended Contumacy: And the Lords of Session did so far justify the Witnesses, that they in a very solemn Manner ordered those Decrees to be suspended. Notwithstanding whereof, the Presbytery's Partiality, and the Illegality of their Proceeding appears further, in that,

V. The Presbytery being resolv'd, *quovis modo*, to examine Witnesses, whether within their Jurisdiction, or without it; whether upon a Citation to compear at *Aberdeen* on the 13th Day of *June*, where Witnesses were not obliged to attend, or at *Nether-Banchory*, the Year following, where they were not cited, did so far prevail with the Sheriff of the *Mearns*, and with the commanding Officer of the Army there, by Military Force, to apprehend and seize the Persons of *John Gray* in *Ashentilly*, and *John Duthy* in *Stonybill*, and carried them to Prison, until they obliged them to grant Bond with Sureties, each under the Penalty of 500 Merks, that they should compear and depose against Mr. *White* at the next Presbytery, to which they were not summoned as aforesaid. And this notable Step, was not only most arbitrary and illegal in it self, but, *Spreta Autoritate*, in open Defiance to the Laws of the Land, and to the Authority and Orders of the Lords of Session, the Supreme Court of this Part of the Kingdom, after a Suspension was offered to the Lords of Session, Answers given in, a solemn Interlocutor in Presence of the whole Lords pronounced, ordering the Suspension to go out, publick Intimation and Notification thereof to the Pursuers Procurators, and

and past His Majesty's Signet several Days before the said Bonds were extorted. Yet, the Presbytery had so little Regard to this when Mr. *White* objected to it, and laid the Matter before them under the Form of Instrument, that they rejected the Protestation, and, in a very arbitrary Way, proceeded to examine the Witnesses in such a Manner, as will appear by the *Sederunt* of the Presbytery at *Banchory*, where probably there was never any Decree or legal Judgment pronounced by any Church Judicature before.

VI. Mr. *White's* next Reason is upon the Account of Iniquity ; in so far as the Presbytery refused to sustain his just Defences against that Part of the Libel which relates to the praying for the Pretender, keeping Fasts, &c. And against the pretended Perjury the Presbytery concludes from thence, in so far as they say, he had taken the Abjuration Oath : And upon this pretended Scandal they seem to found their chief Reason of Deprivation.

As to which, the Reverend Synod would be pleased to remember, *imo*, Mr. *White* in his Defences given in upon the 20th of *February* last, under Form of Instrument, offered positively to prove by unquestionable Evidence, That both before the Rebellion, during the Time thereof, and ever since he had prayed, both in his Congregation and Family, for King *George*, *nominatim*; and that our Kings might be always nursing Fathers to the Church; and that her Truth and Purity might still be preserved against *Rome* and Antichrist. And that, tho' he had prayed for the Pretender (which he still denied) yet the same was qualified in the Terms of the Gospel, 1 *Tim.* 2. 1, 2, 3, 4. where the Word, *Authority*, in the Original, *ὑπεροχή* as it signifies Eminency of Power and Dignity to command without Respect

Respect to the Lawfulness thereof : So, in the same Place, we are enjoined, by undistorted Consequence, to wish well even to our Enemies, Infidels as well as Papists ; because GOD Almighty *would have all Men to be saved, and come in to the Knowledge of the Truth.*

2do, As to the Crime of Perjury, as it must be proved, before there be a Scandal therefrom, as in other Crimes: so it being one of those, which, by the Act of Parliament aforesaid, belongs to the Cognition of the Secular Judges, and not to the Church ; and seeing the Punishment of such a Crime, if it were proved, is Deprivation in a Minister, altho' it were to be judged primarily by the Ecclesiastical Judicatories, as it is not, it can belong to none under a Provincial Synod, by the express Act of Parliament ratified by the Articles of the Union aforesaid.

3tio, Perjury is *Mendacium juramento affirmatum*, done judicially ; and is not by Law inferr'd even by an extrajudicial Oath, much less from Intercessions and Prayers to Almighty GOD.

4to, Nor is Perjury inferred from Witnesses Depositions ; as was decided in the Supreme Criminal Court, Anno 1667, in the Case of *Balkanquel* against Mr. Rig a Minister.

5to, Nor can Perjury be proved by Records, without the original sign'd Subscription of the Person accus'd ; as was decided in the Case of Mr. *James Row* a Minister likewise, Anno 1667. Nor did ever the Presbytery so much as see the Records of the Abjuration-Oath, said to be signed by Mr. *White*, far less any Oath made by him contradictory thereto.

6to, Nor is Perjury inferr'd from Consequences ; otherwise Bigamy would have been punishable by Death,



Death, before the Act of Parliament in Queen Mary's Time; for it was still Adultery, and Adultery before was punishable by Death. So if consequential Perjury were sustained from strain'd Inferences, Constructions or *Innuendo's*; Judges, Advocates, Tutors, Executors, &c. who all give their Oaths *de Fide*, might be pursued, and even before Presbyteries for the Scandal of any Misbehaviour in their Offices.

7<sup>mo</sup>, The Punishment of Perjury is not inferred from the Contravention of Promissory Oaths, the same not being *Mendacium*, when the Swearer designed at the Time to fulfil what he swore, tho' he either could not, or was prevented. For Perjury necessarily requires a *Dolus malus*.

8<sup>vo</sup>, Nor where the Obligation is only to GOD, or relating only to the State, and to no particular Person: For there the Breach does not infer the legal Punishment, & *Deum tantum habet ultorem*; for Damage must still be alledg'd and prov'd in such Cases, otherwise Men might be sued and excommunicate for Breach of their Baptismal Oaths, and many other Things of that Nature, where the Punishment only belongs to GOD. For in such Oaths, no private Person is injured, no *Mendacium* at the taking of the Oaths, nor *Dolus malus* in the not Performance. So that Mr. *White* can, from no Consequence or Analogy of Law or Reason, be pretended to be guilty of Perjury, which however would be cognoscible by another Judicatory, by the express Act of Parliament aforesaid.

And as to Mr. *White's* alledged keeping Fasts and Thanksgivings upon *November 23d.* and *February 2d.* he proponed this unquestionable Defence. Suppose it could be proved, which was denied, That he had Sermon upon those Days; as they were Days appointed by

by the Canons of the Church, the one in Commemoration of Saint *Clement*, and the other, of the Blessed *Virgin's* Purification: So he did these Days preach against the Heresies of the Church of *Rome*, and other practical Gospel-Doctrine, without meddling in the least with the State, or so much as mentioning the *Pretender*, or praying either then, or at any other Time whatsoever for his Success.

VII. Mr. *White's* next Ground for reversing the Presbytery's Sentence, is, That it was for Words spoken sometime in the Months of *October*, *November*, *December*, *January*, or *February*, importing, That the *Pretender* had some Right or Title to the Crown; or that our Sovereign Lord King *George* was not Lawful or Rightful King; which is indeed punishable with the Penalty of *Premunire*, that is, Imprisonment, the Forfeiture of Lands and Goods, and to be out of the King's Protection. But so it is by the Act of Parliament, intituled, *An Act for the Security of Her Majesty's Person and Government*, &c. whereby such Words are made Criminal, which was made immediately after the Union of the Two Kingdoms, That none of the Subjects might be overtaken, it is expressly provided, That no Person shall be prosecuted for any Words spoken, unless the Information of such Words be given upon Oath to one or more Justice or Justices of the Peace, within Three Days after such Words spoken; and the Prosecution of such Offence be within Three Months after such Information; and that no Person shall be convicted, by Virtue of this Act, for any such Words spoken, but by the Oath of Two credible Witnesses. So that, tho' the Presbytery had been competent Judges, Mr. *White* being only summoned on the 22d Day of May to appear on the 13th Day of June, to answer

to the aforesaid Libel, neither sign'd upon Oath before a Justice of Peace, nor prosecute for several Months after the alledged Crime was committed, the same was prescribed as aforesaid, and could be no Ground to forfeit Mr. *White* of his Office and Benefice.

VIII. As to the Probation, tho' the Witnesses had been legally summoned, and otherwise unexceptionable; yet they do not concur in the same Fact as to the Time and Circumstance: For none of them proving, That these Words were spoken in any one of the particular Days, yea even Months libelled, they are but *singulares testes*. And tho' both of them mention praying; yet, mentioning no particular Time, and it being *in actu reiterabili*, that is, that Singularity which the Law calls *Singularitas diversificativa*, it can make no legal Proof.

IX. The Partiality of their Sentence does further appear, in that they proceeded in a clandestine Manner to the Sentence of Deprivation, during the Time of the sitting of the Synod, without calling Mr. *White* to hear Sentence pronounced, as is usual in such Cases, tho' he had not only given in a Declinator, but proponed peremptory Defences, by which they thought probably, he might be ignorant thereof, and so neglect the Opportunity of entering his Appeal. Which appears further from the Clerk's refusing him an Extract of the Sentence, even upon his own Charges. And all this was done and carried on by Persons sitting and voting in the Presbytery; who were, *ipso facto*, deprived by express Acts of Parliament for not taking the Oaths.

But they did not rest there; for after Mr. *White* had appeal'd from the Presbytery's Sentence, they prevailed with the Lieutenant of the County so far as to endeavour, by threatening Letters and Orders to oblige him



to a Submission and Compliance, under Pain of Military Force. And that this was by the Presbytery's Procurement, appears by Copies of the Letters and Orders herewith produced.

As to the *Fifth Point*, viz. That suppose Mr. *White* had been guilty of the Crimes libelled, and that the Prosecution had not been discharg'd by Act of Parliament; yet the same is indemnified by His Majesty's late Gracious *Act of General Pardon*, and he is nowise comprehended under any of the Exceptions in the foresaid Act.

For tho' all Persons, who exercise any Office or Employment Ecclesiastical, Civil or Military, who by Virtue of any Act or Law whatsoever, were disabled to hold or execute the same, remain and continue under such Disability; that Exception has only Relation to Persons, who, by some Law or Act of Parliament, were declared incapable, and disabled to hold or enjoy their Offices, as several of those who pretend to be Mr. *White's* Judges, and are now sitting in the Synod, *ipso facto* were; by the Act, *Anno sexto Reginae*, intitled, *An Act for the better Security of Her Majesty's Person and Government*. And it cannot be pretended, there's any Act or Law, declaring the Crime laid to Mr. *White* his Charge, to infer any Disability or Incapacity, the Act, *Anno sexto Reginae* aforesaid, making such Words spoken, to infer only the Penalty of *Præmunire* upon Information, Prosecution and Probation in Manner mentioned in the said Act. And Mr. *White's* Case seems clearly to come under the *Act of General Pardon*, from the exprefs Words thereof, viz. *As also excepted*

*excepted all Contempts in any Ecclesiastical Court, in such Causes only that have been commenced for Matters of Right, and not for Correction* For the Prosecution in the Ecclesiastical Court against Mr. *White*, could not be for Matter of Right, but for Correction. For sure the Presbytery does not pretend to judge in Matters of Right ; for that even our Saviour himself declines, *St. Luke 12. 14. And he said unto him, Man, who made me a Judge or Divider over you ?*

Upon the whole Matter, Mr. *White* having behaved himself quietly and peaceably in his Congregation, as became a Minister of the Gospel, those 55 Years bypast ; and now being a Man of 80 Years of Age, and under the Protection of the Acts of Indulgence and Toleration ; and discharged from any Prosecution, upon the Account of Words spoken in his preaching, or praying ; and besides, fully indemnified by His Majesty's most Gracious Act of General and Free Pardon : It is humbly hoped, That the Presbtyery's Sentence against him will be reversed, his whole Congregation having unanimously declared their Satisfaction in his Ministry, as appears by the Parochial Certificate signed by them, and ready to be produced.

*Notwithstanding of what is above represented, the Synod refused to reverse the Presbytery's Sentence, or so much as to admit of Mr. White's Appeal.*

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Sir

Sir *Peter Frazer* of *Durris* Lieutenant of the County of *Kincarden*, his Letter to Mr. *George White* Minister of *Maryculter*.

THE Presbytery of Aberdeen having ordain'd Two of their Number to apply to me for an Order, to oblige you to deliver up the Keys of the Church of Maryculter, to any appointed by them, I thought fit to give you my Advice, to make no further Scruples nor Delays about it, &c. And thereafter he adds, I wish ye would avoid my Implying the Military Power, to bring you to a Compliance, being a Thing contrary to my Inclinations to do, but must be obliged to it, in Case of your further Obstinacy or Refusal.

## ADVERTISEMENT.

THE Copy of the Appeal, being in the Printer's Hands several Months ago, had been publish'd much sooner, if it had not been for some particular Reasons. And seeing there are now Two of the Episcopal Clergy in the County of *Aberdeen* commissioned by their Brethren to go for *London* in order to seek Redress; 'tis hoped all good Churchmen will contribute their Advice and Assistance for delivering the Regular Clergy from Presbyterian Persecution.

6 AP 58

Among other Literal Errors, the Reader is desired to mend the following, viz.

P Age 6. Line 9. read Clergy. p. 29. l. 20. r. notwithstanding. p. 31. l. 9. r. Majesty. p. 32. l. 28. after Judicatures, add, now. p. 47. l. 29. r. Obedience. p. 52. l. 17. after People's, add, Rights. p. 53. l. 7. r. Presbyterian. l. 15. r. resolv'd. p. 61. l. 28. r. Presbytery. p. 62. l. 27. r. Privilege. p. 64. l. 8. r. County. p. 66. l. 28. r. Crimes. p. 74. l. perult. for and, r. or. p. 75. l. 8. for, of be, r. be of. p. 76. l. 11. for, had, r. has. l. 29. after Ecclesiastical, add, and, after Lib. add 4.

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